DISCRIMINATION AND THE REGIONAL HUMAN RIGHTS PROTECTION SYSTEMS: THE ENIGMA OF EFFECTIVENESS

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ABSTRACT

Despite the creation of regional human rights protection systems and their efforts, the problems of discrimination, exclusion, and marginalization continue to be widespread, posing formidable barriers for many persons to exercise their basic civil, political, economic, social, and cultural rights. These considerations raise the question of whether the regional human rights protection systems in the Americas and Europe can really impact substantially the eradication of the problem of discrimination, which is part of their mandate.

The author contends in this article that the Inter-American and European Systems do have potential to contribute to the prevention and response to the problem of discrimination, through the execution of their varied mandates and mechanisms. In this sense, the author discusses in the article emerging legal tendencies that are noteworthy from both systems, among these: i) the special treatment of a number of groups as "vulnerable" or "in a situation of vulnerability;" ii) an approach considering the intersection of different identities or factors of discrimination; iii) a flexible reading to the textual prohibition of discrimination in the major treaties, identifying more prohibited motives such as sexual orientation and gender identity; iv) an avid link between violence and discrimination, and the obligation to act with due diligence when

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these acts are committed by non-State actors; and v) the issue of stereotypes and how these influence negatively the actions of State authorities towards historically marginalized groups and society as a whole. The article will review how these legal tendencies offer both opportunities and challenges to these two regional protection systems to improve their effectiveness in efforts to address in a structural and transformative way the problem of discrimination in the Americas and in Europe.

This paper contributes to current scholarship in this area by comparing the approach to discrimination issues of two regional human rights protection systems; examining the overall response of these institutions to discrimination through the lens of effectiveness and the varied mechanisms of each system; and considering the different social contexts, political realities, and financial pressures these systems face, which impact their overall work in the protection and promotion of human rights.

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1. INTRODUCTION

This article discusses the regional human rights protection systems in the Americas and Europe and ponders the following provocative question: Can they ever be fully effective in the prevention and response to the problem of discrimination and its different manifestations?

Despite their different conformations, both the Inter-American and European systems have taken advantage of their various mandates to issue many case decisions and pronouncements rejecting practices which are considered discriminatory, and issuing orders to states as to how to address these in the present and the future.[1] Many of the human rights violations tackled by these systems relate to discrimination within the family, being perpetrated by partners against partners, by parents against children, and by the government authorities against families.[2] Others have taken place in the health, education, employment, and various public settings.[3] Women and children, racial and ethnic

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[1] *See, e.g.*, Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, at 86–87 (Feb. 24, 2012) (holding that the State had violated the victim's rights to equality and non-discrimination on the basis of her sexual orientation, thereby requiring the State to provide medical and psychiatric care, free of charge and in an immediate, appropriate and effective manner, through its specialized public health institutions, among other reparations); Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II. doc. 69 (2011) (finding the state responsible for violations of Articles I, II, VII, and XVIII of the American Declaration by failing to exercise due diligence to protect Jessica Lenahan and her daughters from acts of domestic violence perpetrated by her ex-husband); D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R. (2007).

[2] *See generally* Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009) (considering state failures to protect from domestic violence can constitute gender-based discrimination); Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II. doc. 69 (2011); Kontrová v. Slovakia, App. No. 7510/04, Eur. Ct. H.R. (2007) (finding violations of the right to life and to remedy for a domestic violence case resulting in the death of the applicant's children due to police failures in protection); *see also* E & Others v. United Kingdom App. No. 33218/96, Eur. Ct. H.R. (2003); Z & Others v. United Kingdom, App. No. 29392/95, Eur. Ct. H.R. (2001).

[3] *See, e.g*, Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 3181, ¶¶ 435–508 (Oct. 20, 2016) (holding that the State violated the rights of workers used as slave labor, entitling them to reparation damages); I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 32, ¶¶ 117–323 (Nov. 30, 2016) (holding that the State violated the rights to liberty, dignity, private and family life, and access to information of a woman sterilized without her consent); Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits,

minorities, and persons discriminated against on the basis of their actual or perceived sexual orientation and gender identity have been very prominent in this work, frequently the target of discrimination, exclusion, and bias, both individually and structurally.[4]

Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 298, ¶¶ 156–229 (Sept. 1, 2015) (finding the victim suffered intersectional discrimination due to her situation as a person living with HIV, a child, a female, and living in conditions of poverty); *see also* Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., (July 25, 2017) (holding that the Supreme Administrative Court's decision to reduce the amount initially awarded to the applicant in respect to non-pecuniary damage had amounted to discrimination on the grounds of sex and age in violation of Article 14 together with Article 8 of the Convention); Konstantin Markin v. Russia [GC App. No. 30078/06, Eur. Ct. H.R. (Mar. 22, 2012) (discussing how the refusal of the domestic authorities' to grant the applicant parental leave because he belonged to the male sex was a violation of the applicant's Convention Rights); Kiyutin v. Russia, App. No. 2700/10, 53 Eur. H.R. Rep. 26 (2011) (explaining that the applicant alleged that he had been a victim of discrimination when applying for a Russian residence permit, on the basis of his health); V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H. R (2011) (ruling in favor of the applicant who was a victim of forced sterilization in a state hospital in Slovakia, and concluding that the applicant's rights to freedom from degrading and inhuman treatment (under article 3 of the Convention) and the right to private and family life (under article 8 of the Convention) had been violated).

[4] *See, e.g.*, Expelled Dominicans & Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶439 (Aug. 28, 2014) (delineating various rights the State violated, including the right to nationality, in a context of discrimination against persons born in the Dominican Republic of Haitian descent); González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 127 (Nov. 16, 2009) (highlighting state failures to protect the rights to life and to be free from all forms of violence and discrimination of three women who were first reported as disappeared and then found dead in Ciudad Juarez); Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II. Doc. 32 (2011) (indicating that the State has a legal and due diligence obligation to adopt positive measures to protect women from domestic violence under Article II of the American Declaration); Girls Yean & Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct. H.R. (Ser. C.) No. 130 ¶¶ 59–60 (2005) (ordering that the State publicly apologize to the victims whose applications for birth certificates the State rejected; the lack of birth certificates had constituted a barrier for the victims to attend school and various other crucial activities); Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. ¶ 48 (2009) (underscoring the complex and widespread nature of the problem of domestic violence and the duty of states to act with due diligence to prevent and respond to this issue); N.B. v. Slovakia, App. No. 29518/10, Eur. Ct. H.R. ¶ 15 (June 12, 2012) (discussing how the victim's "right to respect for her private and family life had been violated as a result of her sterilization, which had been carried out contrary to the requirements of the relevant law and without her and her mother's full and informed consent"); Karner v. Austria, App. No. 40016/98, Eur. Ct. H.R. ¶ 9 (July 24, 2003) (highlighting and subsequently rejecting the Government's argument that a difference in treatment based on sex or sexual orientation is justified and proportional to the aim of protecting the family in a traditional sense).

Nonetheless, the issues of discrimination, exclusion, and marginalization are still widespread in Europe and the Americas, posing formidable barriers for many persons to exercise their basic civil, political, economic, social, and cultural rights.[5]

Both systems continue to receive in the present case petitions and information from different sectors claiming forms of discrimination, and a great deal of their work is dedicated to issuing rulings concerning these issues.[6] Discrimination is also an evolving social issue, exemplified by the problems the Americas and Europe face today, including hate speech, xenophobia, and persistent systemic and institutional discrimination.[7] Leaders of key countries

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[5] *See generally* Inter-Am. Comm'n H.R., Annex to Press Release 220/18, Summaries of Hearings 169th Period of Sessions in Boulder, Colorado (Oct. 19, 2018); COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS (2016); EUROPEAN COMMISSION, DIRECTORATE-GENERAL JUSTICE, Discrimination in the EU in 2012: Report, Special Eurobarometer 393 (Nov. 2012); Econ. Comm'n for Latin America and the Caribbean (ECLAC), *The Social Inequality Matrix in Latin America,* LC/G.2690 (MDS. 1/2) (Nov. 1, 2016; United Nations Human Rights Council, Report of the Working Group of Experts on People of African Descent, Visit to the United States, A/HRC/33/61/Add. 2) (Aug. 18, 2016); Committee on the Elimination of Discrimination against Women, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination Against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/OP.8/CAN/1 (Mar. 30, 2015).

[6] For recent rulings on discrimination issues from both the European and Inter-American systems, *see generally* Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., (July 25, 2017) (holding that the Supreme Administrative Court's decision to reduce the amount initially awarded to the applicant in respect of non-pecuniary damage had amounted to discrimination on the grounds of sex and age in violation of Article 14 together with Article 8 of the Convention)*; see also* Konstantin Markin v. Russia [GC App. No. 30078/06, Eur. Ct. H.R. (Mar. 22, 2012) (discussing how the refusal of the domestic authorities' to grant the applicant parental leave because he belonged to the male sex was a violation of the applicant's Convention Rights); Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 3181 (Oct. 20, 2016) (holding that the State violated the rights of workers, entitling them to reparation damages); I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 32 (Nov. 30, 2016) (holding that the State violated a person's right to liberty, dignity, privacy and access of information as well as a person's right to start a family).

[7] *See* Inter-Am. Comm'n H.R., Strategic Plan 2017–2021, at 24–27, http://www.oas.org/en/iachr/mandate/StrategicPlan2017/default.asp [https://perma.cc/5G5Z-9JW] (explaining how some countries have witnessed public expressions by authorities centered on nationalism and forms of discrimination like xenophobia, misogyny, homophobia, etc.); Inter-Am. Comm'n H.R., Press Release No. 124/17, IACHR *Repudiates Hate Speech and Violence in Charlottesville, Virginia, United States* (Aug. 18, 2017), http://www.oas.org/en/iachr/media_center/PReleases/2017/124.asp [https://perma.cc/3CN9-WWFH] (relaying what happened at a White Nationalist Rally held in Charlottesville, Virginia where there were demonstrations of racial

have been elected after waging campaigns filled with messages contrary to the principles of discrimination, equality, inclusion, and human rights.[8] The perpetrators are varied, going beyond the State, including businesses and individuals.[9] The most extreme manifestation of discrimination, violence, has a more expansive definition and exemplification every day, extending beyond the rubrics of the physical, psychological, and sexual; occurring in the internet, cyber space, employment, and medical institutions, among others; and permeating many social spheres. There are mass movements all over the Americas and Europe demanding attention, prevention, and adequate response to violence and abuse, such as "*me too*", "*Time's Up*", and "*Ni una menos*", which advocate for

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hatred and xenophobia and resulting loss of life); Eur. Consult. Ass., *Annual Activity Report 2017,* at 32–33, https://rm.coe.int/annual-activity-report-2017-by-nils-muiznieks-council-of-europe-commis/168077ec86 [https://perma.cc/2BWN-SSJT] (detailing the various initiatives taken to address human rights violations); NO HATE SPEECH MOVEMENT, *Action Day Countering Sexist Hate Speech* (Feb. 17, 2017), http://blog.nohatespeechmovement.org/action-day-to-counter-sexist-hate-speech-8-march-2017-2/ [https://perma.cc/L7TK-862T] (focusing on a specific campaign that is directed against hate speech, explaining how sexist hate speech builds on narratives reaffirming gender stereotypes).

[8] See AMNESTY INTERNATIONAL, THE STATE OF THE WORLD'S HUMAN RIGHTS, REPORT 2016/2017, Foreword, at 12–15 (Feb. 22, 2017), https://www.amnesty.org/en/documents/pol10/4800/2017/en/ [https://perma.cc/FDG4-BBJS] (expressing concern over a global trend of divisive politics, in which well-known leaders frequently invoke misogyny, xenophobia, and anti-human rights discourse); *World Report 2017: Demagogues Threaten Human Rights*, HUMAN RIGHTS WATCH, at 1–14 (Jan. 12, 2017), https://www.hrw.org/news/2017/01/12/world-report-2017-demagogues-threaten-human-rights [https://perma.cc/V5EL-HXTK] (referring to the rise of populism and authoritarianism as a global treat to human rights requiring a reaffirmation of the values advanced by the modern human rights movement); Europe and Nationalism: A Country-by-Country Guide, BBC NEWS (Apr. 25, 2019), http://www.bbc.com/news/world-europe-36130006 [https://perma.cc/JM9N-RGUV] (mapping the "significant electoral gains" made by nationalist and far-right parties throughout Europe); *see also* Mark Landler, *Brazil's Bolsonaro is the Face of Populism at the Davos Forum*, N. Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/world/americas/bolsonaro-populist-davos-forum.html [https://perma.cc/DE2Z-AUMM] (reporting on Brazil's president "nationalist instincts, strongman style, and history of making crude statements about women, gay people and indigenous groups . . . ").

[9] *See* HURST HANNUM, DINAH SHELTON, S. JAMES ANAYA, & ROSA CELORIO, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 335–461 (Wolters Kluwer Publishers, 6TH ed., 2017), Chapter 5, *Who has Legal Obligations under International Human Rights Law?*, at 336–461 (offering an overview and case examples of the range of non-state actors whose actions have human rights dimensions, including corporations, inter-governmental organizations, religious bodies, terrorist networks, organized crime syndicates, and others).

women to speak out and be heard regarding their experiences with sexual assault and harassment.[10]

This complex context and developments raise the question of whether there are ways to make these regional protection systems more effective, or even preserve the level of impact they have today, in addressing the nuance of discrimination. In the author's view, the way the regional protection systems respond to these highly prevalent issues through their case law and other mechanisms is a window to their present and future relevance.

As a potential response to the question initially posited, this article discusses the concept of effectiveness in international human rights law and examines the work of these systems in the area of discrimination through their impact in theory and practice, considering the contemporary challenges these institutions face. The author discusses emerging legal tendencies that are noteworthy from both systems, including: i) the special treatment of a number of persons and groups as "vulnerable" or "in a situation of vulnerability", along with a better understanding of the issue of stereotypes and how these negatively influence the actions of state authorities towards historically marginalized groups;[11] ii) an

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[10] For more information on these movements, see ME TOO, https://metoomvmt.org/about/ [https://perma.cc/J7BU-CGLL] (last visited Mar. 18, 2019); TIME'S UP, https://www.timesupnow.com, [https://perma.cc/3P3E-TUEN] (last visited Mar. 18, 2019); NIA UNA MENOS, http://niunamenos.com.ar/ [https://perma.cc/73VN-X5L3] (last visited Mar. 18, 2019).

[11] *See, e.g.*, D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R., ¶¶185–96 (2007); V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H. R, ¶ 146 (2011); Inter-Am. Comm'n H.R., *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc. 49/13, ¶¶ 614–67 (Dec. 31, 2013) (setting forth conclusions on the human rights situation in Colombia, after making recommendations to address the situation of individuals and groups historically discriminated against and marginalized); Council of Europe Convention on preventing and combating violence against women and domestic violence, art. 12, May 11, 2001, C.E.T.S. No. 210 [hereinafter Istanbul Convention] (mandating states to adopt measures to modify social and cultural patterns of behavior based on gender discrimination and stereotypes, as part of their response to violence against women); Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, art. 6, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter Convention of Belém do Pará] (safeguarding the right of women to be free from violence and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination); Inter-American Convention against all Forms of Discrimination and Intolerance, art. 4(x), ORGANIZATION OF AMERICAN STATES, June 5, 2013 [hereinafter OAS Convention on Discrimination and Intolerance] (allowing states to assume the obligation to adopt measures to eliminate all forms of discrimination

approach considering the intersection of different identities or factors of discrimination in the response to human rights violations faced by persons or groups;[12] iii) a flexible reading to the textual prohibition of discrimination in the major treaties, identifying more prohibited motives such as sexual orientation and gender identity;[13] and iv) an avid link between violence and discrimination, and the obligation to act with due diligence when these acts are committed by non-state actors.[14]

The article reviews how these legal tendencies offer both opportunities and challenges faced by these two regional protection systems to improve the effectiveness of their efforts to address discrimination and its many forms in the Americas and in Europe in a structural and transformative way. The author will focus primarily on the case-law issued by both systems and on regional treaties that address cornerstone discrimination issues in both the Americas and Europe. It is important to note however that a great deal of pronouncements issued at the European and Inter-American levels on discrimination issues have occurred outside the realm of case decisions, and some of these will sometimes be referred to throughout the article when relevant.

This article seeks to contribute to current scholarship in this area by comparing the approach to discrimination of two regional human rights protection systems; examining the overall response of these institutions to the complexity of discrimination through the lens of effectiveness and the varied mechanisms of each system; and considering the different social contexts, political realities, and

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and intolerance, including those reflected in teaching materials which portray stereotypes).

12 *See* Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 298, ¶ 290 (Sept. 1, 2015); B.S. v. Spain, App. No. 47159/08, Eur. Ct. H.R., ¶¶ 58–63 (July 24, 2012) (holding that domestic courts did not take into account the applicant's vulnerability as a woman of African descent in investigating police abuse, resulting in violations of Articles 3 and 24 of the European Convention).

13 *See, e.g.*, Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, Eur. Ct. H. R., ¶¶ 21–36 (Dec. 21, 1999); Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 78–99 (Feb. 24, 2012) (offering, in both cases, a flexible reading to the discrimination prohibitions codified in the European Convention and the American Convention to include sexual orientation).

14 *See generally* Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009); Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II. (2011).

financial pressures these systems face which impact their overall work in the protection and promotion of human rights.

In the first section of this article, the author discusses some background information on the differences between the European and Inter-American systems, the current institutional, political, and economic challenges they face, and their work on discrimination. In the second part of this article, the author analyzes the concept of effectiveness and its different dimensions when discussing regional human rights protection systems and their work on discrimination. In the third part of this article, the author analyzes tendencies that are evident in the jurisprudence and legal work of the European and Inter-American systems which present important opportunities in standard setting, despite the challenges described above, analyzing in particular cases concerning women; children; racial and ethnic minorities; and persons discriminated against on the basis of sexual orientation and gender identity. The article will also advance considerations related to dispositions contained in new regional treaties adopted by both systems which are relevant to the prohibition of discrimination and the guarantee of equality.

The author closes this paper with some final thoughts concerning key challenges and opportunities the European and Inter-American systems will face in order to become more effective in the area of discrimination.

1.1. The European and Inter-American Human Rights Protection Systems, Discrimination, and Contemporary Problems

It is important to begin by noting that the European and Inter-American systems have different structures. The most important case work of the European system of human rights is performed under the rubric of the Council of Europe and its full-time Court [hereinafter European Court of Human Rights or European Court] as well as the supervision offered by the Committee of Ministers.[15] Other entities within the Council of Europe also address human

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[15] *See generally* European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 19–51, 54, Nov. 4, 1950, C.E.T.S. No. 5, 213 U.N.T.S. 222, as amended by the provisions of Protocol No. 14. (C.E.T.S. No. 194) as from its entry into force on June 1, 2010 [hereinafter European Convention]; Protocol 11 to the Convention on the Protection of Human Rights and Fundamental Freedoms, arts. 1–7, May 11, 1994, MC.E.T.S. No. 155.

rights issues employing diverse mechanisms, such as its Parliamentary Assembly and its Commissioner for Human Rights.[16]

The Inter-American system—created under the purview of the Organization of American States (OAS)—is composed of a Commission [hereinafter Inter-American Commission] which is a quasi-judicial body with the mandate to process individual case petitions and monitor human rights generally through on-site visits, the publication of country and regional reports, and the adoption of urgent measures.[17] The Americas also has a Court [hereinafter Inter-American Court] which has both contentious and advisory jurisdiction. Significantly, the Americas system is part-time, which means that the Commissioners and Judges appointed to these organs are not full-time employees; a major difference with the European system.[18] This paper takes into account these differences when comparing the case work of these systems. An important similarity is that both the OAS and the Council of Europe have the capacity to adopt their own regional treaties, some general and some specific in nature, a faculty which will be discussed throughout this paper when pertinent; and have referred to each other's standards when ruling in key areas of human rights.[19]

The question of effectiveness is even more acute today since the European and Inter-American systems are facing a number of significant contemporary challenges. They operate in contexts such as Europe and the Americas, where there is a rise of nationalist movements which do not favor multilateral conformations and human rights protection systems.[20] Some of the countries which

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[16] For information on the mandate and functioning of the Parliamentary Assembly of the Council Europe, see http://website-pace.net/en_GB/web/apce/in-brief [https://perma.cc/VG8L-FX4J]. For reports and other statements of the Council of Europe Commissioner for Human Rights, see https://www.coe.int/en/web/commissioner [https://perma.cc/T62G-4B5Y].

[17] *See* American Convention on Human Rights, arts. 33–51, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Inter-Am. Comm'n H.R., Rules of Procedure [hereinafter IACHR Rules of Procedure], arts. 23–50, 53–70 (2013).

[18] *See* American Convention, *supra* note 17, arts. 52–69*; see also* IACHR Rules of Procedure, *supra* note 17, arts. 34–56, 70–75.

[19] *See* European Convention, *supra* note 15; American Convention, *supra* note 17; Convention of Belém do Pará, *supra* note 11; Istanbul Convention, *supra* note 11; OAS Convention on Discrimination and Intolerance, *supra* note 11; Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009).

[20] *See* AMNESTY INTERNATIONAL, *The State of the World's Human Rights, Report 2016/2017* (Feb. 22, 2017) (indicating that President Trump's policies will significantly undermine multilateral co-operation and usher in a new era of greater

integrate these systems have recently elected leaders who waged campaigns advancing a very public anti-human rights and discriminatory discourse, and are issuing measures which echo these themes.[21] The continued relevance of supranational protection systems and international law is frequently called into question by many officials.[22] Some key states have also publicly withdrawn from major treaties which govern the functioning of these systems, and some leaders have encouraged this tendency.[23] The systems are

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instability and mutual suspicion); HUMAN RIGHTS WATCH, *World Report 2017: Demagogues Threaten Human Rights* (Jan. 12, 2017) (noting that rising influence of political parties and leaders in Europe that advocate for anti-human rights discourse, posing key challenges for the existing human rights system); *Europe and right-wing nationalism: A country-by-country guide*, BBC (May 23, 2016), http://www.bbc.com/news/world-europe-36130006 [https://perma.cc/FZ83-7AT6] (evaluating the rise of nationalism in Europe by examining nationalist and far-right party electoral gains in various European nations); *see also* Mark Landler, *Brazil's Bolsonaro is the Face of Populism at the Davos Forum*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/world/americas/bolsonaro-populist-davos-forum.html [https://perma.cc/3TCE-3RX4] (describing Bolsonaro's right-wing rhetoric at the Davos Conference juxtaposed by the conference's general themes of global cooperation and a liberal world order).

[21] *See* Sophie Tatum, *Rights group: Rise of Trump, far-right leaders puts 'human rights system at risk'*, CNN POLITICS (Jan. 14, 2017), https://www.cnn.com/2017/01/14/politics/human-rights-watch-donald-trump/index.html [https://perma.cc/X83T-Q458] (reporting on how President Trump's campaign racist rhetoric jeopardizes the human rights system); Jeremy Diamond & Steve Almasy, *Trump's Immigration Ban Sends Shockwaves*, CNN POLITICS (Jan. 30, 2017), https://www.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/index.html [https://perma.cc/F696-NZBM] (reporting on the effects of Trump's immigration ban which denies entry to millions of refugees, most of whom are from Muslim-majority countries, and left thousands detained at US airports).

[22] United Nations Secretary General, *Remarks at Security Council Open Debate on "Strengthening Multilateralism and the Role of the United Nations"*, (Nov. 9, 2018), https://www.un.org/sg/en/content/sg/speeches/2018-11-09/strengthening-multilateralism-and-role-un-remarks-security-council [https://perma.cc/K8VB-P2G9] (reiterating the importance of multilateral efforts and new forms of cooperation with international and regional organizations); Eric Posner, *The Case against Human Rights*, THE GUARDIAN (Dec. 4, 2014), https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights [https://perma.cc/QY8R-BSKA] (making the argument that human rights law has failed to accomplish its objectives because human rights are not as universal as previously believed, and cannot be forced upon countries as a matter of international law).

[23] *See* Inter-Am. Comm'n H.R., Press Release No. 64/13, IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention (Sept. 10, 2013), http://www.oas.org/en/iachr/media_center/preleases/2013/064.asp [https://perma.cc/LQ46-G63W] (calling on Venezuela to reconsider its denunciation of the American Convention on Human Rights); Anushka Ashtana &

also tackling important structural challenges such as the partial or complete non-compliance with judgments, staffing shortages, and financial concerns.[24]

Based on these considerations, the author in the next section discusses variables which affect the effectiveness of these two regional human rights protection systems, and later analyzes promising tendencies in the area of discrimination that present important opportunities to become more impactful and maintain their relevance.

1.2. The Challenge of Effectiveness in International Human Rights

The author considers that it is important to examine the body of work and the legal standards set by a regional human rights system as a measure of present and future effectiveness. As indicated in her previous scholarship, a major part of the work of regional human rights protection systems is devoted to producing legal standards with important implications for states.[25] A human rights standard constitutes a legal obligation for the state involved and sheds light on the content of this obligation. In this sense, the case decisions

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Rowena Mason, *UK Must Leave European convention on Human Rights, says Theresa May*, THE GUARDIAN (Apr. 25, 2016), https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum [https://perma.cc/BCY9-HDJ3] (highlighting Theresa May's call for Britain to withdraw from the European Convention on Human Rights regardless of the EU referendum result).

[24] *See* Monica Pinto, *The Role of the Inter-American Commission and the Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges,* Hum. Rts. Brief 20, No. 2, 34–38 (2013) (discussing important developments, problems, legal standards, and the political context of the regional human rights protection system in the Americas); Lawrence R. Helfer, *The Successes and Challenges for the European Court, Seen from the Outside*, AM. J. INT'L L. UNBOUND (May 14, 2014), https://www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/ [https://perma.cc/5MJD-8MCS] (drawing upon research on human rights systems outside of Europe to examine how these institutions have responded to challenges faced by the Council of Europe and the ECTHR).

[25] *See* Rosa Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard Setting*, 65 U. MIAMI L. REV. 819, 822–23 (2011) [hereinafter Celorio, *The Rights of Women in the Inter-American System of Human Rights*] (analyzing the development of standards related to the human rights of women within the context of the inter-American system of human rights).

adopted by the European Court, and the Inter-American Commission and the Court, constitute legal and authoritative pronouncements related to the scope of individual articles of the European and Inter-American regional treaties and instruments. A standard issued by these regional protection systems can also offer an important guideline for the state implicated on how to adequately and effectively implement, at the national level, the individual rights contained in the governing instruments of these systems. These standards can be issued in the context of individual case decisions, but also in non-case work. The ability to produce legal standards and pronouncements which are well-researched, relevant, timely, and informed, which lead States to adopt measures at the ground level to comply with their internationally-assumed obligations, is an important variable in measuring the effectiveness of a regional protection system. This is key to achieve full protection from human rights violations and their short- and long-term prevention.

There is already some scholarship devoted to examining whether the regional systems in Europe and the Americas are effective as a whole in the area of human rights protection, in particular for individual case decisions.[26] Scholars have also developed important doctrine concerning the treatment of discrimination and the legal developments in the two systems.[27] The

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[26] *See*, *e.g.*, Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, 25 EUR. J. INT'L L. 205–27 (2014) (examining the factors accounting for variable patterns in the enforcement of the judgments of the European Court of Human Rights); Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, QUEBEC J. INT'L L. (Special Edition) 127 (2011) (reviewing the general functioning of the inter-American system of human rights and identifying needed measures to enhance its role in human rights protection); Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L. J. 493 (2011) (arguing that the Inter-American Court of Human Rights should engage more closely with national courts to improve compliance of its judgments).

[27] *See, e.g.*, Alexandra Timmer, Strengthening the Equality Analysis of the European Court of Human Rights: The Potential of the Concepts of Stereotyping and Vulnerability, (Feb. 2014) (published Doctor of Law dissertation, University of Ghent) (examining how the court can develop a more transformative equality jurisprudence to address the underlying causes of inequality and discrimination); Carmelo Danisi, *How Far Can the European Court of Human Rights go in the Fight Against Discrimination? Defining New Standards in its Non-discrimination Jurisprudence*, INT'L J. CONST. LAW 9 (3–4), 793–807 (2011) (analysing how the ECtHR has definitely broadened the scope of the prohibition of discrimination contained in article 14 of the ECHR); Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 25; Rosa Celorio, *The Case of Karen Atala and Daughters:*

most important variable historically used to assess whether the European and Inter-American systems are effective in a given area has been whether states fully comply with their case decisions.[28] The analysis usually centers on whether a state adjusted its conduct as a result of the case decision at issue. The conduct change can be in the form of completing an investigation or reforming the legislation, public policies, institutions, and programs in a given country as a result of the case at issue.

For the author, though, effectiveness is a broad and integral concept, extending beyond the objective notion of compliance with case decisions.[29] A regional human rights system can have a significant subjective influence on state conduct and discourse without having those same states fully comply with its case decisions.[30]

State conduct is also not the only measure of effectiveness of a regional human rights protection system. In the author's view, there are many variables that affect whether a given system is having impact on a human rights issue. Take for example an issue very linked to discrimination—the widespread problem of violence against women. Even though compliance with the judgments of the European and Inter-American Court is still lacking and the problem

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Towards a Better Understanding of Discrimination, Equality, and the Rights of Women, 15 CUNY L. REV. 335 (Summer 2012) [hereinafter Celorio, *The Case of Karen Atala and Daughters*] (regarding the process begun by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights to define the contours of the obligation not to discriminate and respect and ensure the dimensions of gender equality).

[28] *See, e.g.*, Anagnostou & Mungiu-Pippidi, *supra* note 26 (examining several factors which account for variable patterns of state compliance with the judgments of the European Court of Human Rights); Dulitzky, *supra* note 26 (analyzing the latest reforms of rules and regulations of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights); Huneeus, *supra* note 26 (alluding to the far-reaching remedies and reparations issued by the Inter-American Court of human Rights and the key role of national justice systems in enforcing these).

[29] *See* Timothy Meyer, *How Compliance understates Effectiveness*, AM. J. INT'L L. UNBOUND (June 18, 2014), https://www.asil.org/blogs/how-compliance-understates-effectiveness [https://perma.cc/2XZJ-MQ7G] (arguing that international law can be very impactful in changing a state's behaviour over time, even in cases of low compliance); Liam Murphy, *Varieties of Effectiveness: What Matters?*, AM. J. INT'L L. UNBOUND (June 19, 2014), https://asil.org/blogs/varieties-effectiveness-what-matters [https://perma.cc/2XZJ-MQ7G] (arguing that "focusing solely on effectiveness as inducing compliance for reasons of self-interest, and on effectiveness as enforcement, can leave us with too narrow a view of how international law might make a difference in the world").

[30] *See* Murphy, *supra* note 29.

is widespread, it is undisputable today that the work of these systems on this issue has contributed to the following positives: the development of jurisprudence and legal standards with content conducive to enforcement; the collaboration between systems and cross-referencing of their work; the existence of progress and advances in the legislation, policies, and programs at the national level in Europe and the Americas; an increased participation of victims, states, civil society organizations, international entities, and academic institutions in the work of these systems in a specific area; and a plethora of initiatives to increase the capacity of states and their own entities in the enforcement of the judgments and orders of the regional human rights protection systems.[31] The OAS and the Council of Europe have also adopted treaties solely devoted to violence against women, which is not a minor achievement, in an area with a great deal of deep-seated structural and cultural challenges.

The author considers these objective and subjective variables in concluding that the legal tendencies described in the following section entail potential opportunities for the European and Inter-American systems to set legal standards that increase their effectiveness in the area of discrimination.

2. MOVING FORWARD IN DEFINING THE CONTOURS OF DISCRIMINATION: KEY LEGAL TENDENCIES IN EUROPE AND THE AMERICAS

Some of the most interesting work of the European and Inter-American systems is devoted to the situation of persons and groups who have been affected by a history of discrimination,

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[31] *See generally* European Parliament, *The Issue of Violence against Women in the European Union* (2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556931/IPOL_STU(2016)556931_EN.pdf [https://perma.cc/QL3F-CDNY]; Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, C.E.T.S. no. 210 (2011); Inter-Am. Comm'n H. R., Thematic Hearing, *Challenges of Protecting Women from Violence 20 Years after the Belém do Pará Convention* (Mar. 27, 2014), https://www.youtube.com/watch?v=5jAAWqEKJVc [https://perma.cc/2XZJ-MQ7G]; Inter-Am. Comm'n H. R., *20th Anniversary of Adoption of the Convention of Belém do Pará* (June 9, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/065.asp [https://perma.cc/5CHS-MJHB]; Istanbul Convention, *supra* note 11.

marginalization, and exclusion. In this area in particular, there are four legal tendencies that pose some interesting opportunities and challenges for both systems.

First, there is a noteworthy and increased use of an approach that considers the "vulnerability" of persons and groups to given human rights violations, and the stereotypes that accentuate this risk.[32] Second, there is an increasing incorporation of the "intersectional" focus, which considers the multiple factors that when combined increase the exposure of a person to discrimination.[33] Third, there is a cognizable tendency to identify new prohibited motives to discriminate as part of the non-discrimination clauses in the regional treaties, and their interpretation.[34] Fourth, there is a consistent link associated between discrimination and violence, and a reiteration of the due diligence standard as a benchmark to prevent and respond to this violence; especially when perpetrated by non-state actors.[35] The

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[32] *See*, *e.g.*, V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H. R, ¶ 146 (2011) (noting that the problem of forced sterilization affected vulnerable persons belonging to ethnic groups, like the Roma population of Eastern Slovakia); Inter-Am. Comm'n H. R., *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc. 49/13, ¶¶ 614–67 (Dec. 31, 2013) (detailing the specific groups that are especially vulnerable and suffer discrimination, such as Afro-descendant persons and indigenous peoples, in the context of the Colombian armed conflict); Istanbul Convention, *supra* note 11, art. 12 (detailing a number of state obligations to prevent and respond to violence against women); Convention of Belém do Pará, *supra* note 11, art. 6 (providing that a woman's right to be free from violence includes her right to be free from all forms of discrimination); OAS Convention on Discrimination and Intolerance, *supra* note 11, art. 4(x) (alluding to state obligations to address the stereotypes referred to in teaching materials and other tools).

[33] *See, e.g.*, B.S. v. Spain, App. No. 47159/08, Eur. Ct. H.R., ¶¶ 58–63 (July 24, 2012) (explaining that when state authorities investigate violent incidents, they have a correlative obligation to identify whether racist motives had a role in the events); Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 298 (Sept. 1, 2015) (discussing the concept of intersectionality and its connection with discrimination on the basis of sex, gender, age, economic position, and health status).

[34] *See, e.g.*, Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, Eur. Ct. H. R., ¶¶ 21–36 (Dec. 21, 1999) (declaring human rights violations and international state responsibility when a domestic court decision and custody determination was based exclusively on a person's sexual orientation); Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 78–99 (Feb. 24, 2012) (considering that the general prohibition of discrimination codified in Article 1(1) of the American Convention and its phrase "any other social condition" can be interpreted to include categories not explicitly mentioned).

[35] *See generally* Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009); Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II (2011).

author presents below some considerations related to these tendencies and their relevance for the effectiveness of these systems.

2.1. Vulnerability, Stereotypes, and Beyond

When the discrimination work of both the European and Inter-American systems is compared, an increased and more specialized focus on persons and groups that are in a "vulnerable" position, and particularly exposed to barriers in the exercise of their human rights, seems evident.

In the European system, this approach has been illustrated in its case law, in decisions from the European Court concerning the Roma, women, persons with disabilities, persons living with HIV, children, and detainees, among others affected.[36] At least two tendencies can be identified in the European Court's case law: i) treating certain persons and groups as "vulnerable"; and ii) offering special treatment or protection to given persons and groups without calling them vulnerable per se.[37]

Key examples of this trend in the jurisprudence of the European Court of Human Rights can be found in its cases concerning the Roma in different countries and difficulties in exercising basic rights in the education and health settings, among other areas. In *D.H. & Others vs. the Czech Republic*, the Court refers to the history of disadvantage and vulnerability of the Roma population in the Czech Republic, and how the problem of indirect discrimination impacts

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[36] *See, e.g.*, D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R., ¶182 (2007) (highlighting the turbulent history and constant uprooting of the Roma people, a historically disadvantaged and vulnerable minority); Alajos Kiss v. Hungary, App. No. 38832/06, 2 Eur. Ct. H.R., ¶ 42 (2010) (establishing that a State cannot absolutely bar a person with a mental disability from voting, considering this group has historically suffered discrimination); M.S.S. v. Belgium and Greece, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 251 (2011) (acknowledging that a person's status as an asylum-seeker means that the person is a member of a particularly underprivileged and vulnerable group); Kiyutin v. Russia, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 63 (2011) (establishing that States must have "weighty reasons" that justify the restriction of rights of persons belonging to vulnerable and historically discriminated groups on account of their sex, sexual orientation, race, ethnic background, or disability).

[37] *See generally* Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 INT'L J. CONST. LAW 1056, 1056–85 (2013) (analyzing the development and use of the concept of vulnerability in the jurisprudence of the European Court of Human Rights).

the services they receive in the education setting.[38] The case relates to Roma children who were placed in special education schooling—a largely segregated system—without justification, as opposed to non-Roma children.[39] The Court considered, based on statistical evidence, that Roma children were over-represented in special schools and shifted the burden of proof to the state to prove that this different treatment on the basis of ethnic origin had an objective and reasonable justification.[40] The Court concluded that the state had failed to duly justify the different treatment by basing school placement decisions on biased and prejudiced testing, which severely impacted the education and personal development of Roma children, in violation of Article 14 of the European Convention, in conjunction with Article 2 of Protocol No. 1 on the right to education.[41]

Turning to the health setting, in *V.C. vs. Slovakia*, the European Court found violations to the right to private life of the applicant under Article 8 and to inhumane and degrading treatment under Article 3, as well as other rights under the European Convention, when she was sterilized without her consent.[42] The applicant claimed that she had been sterilized without her informed consent in a public hospital due to her Roma origin, which ended in her infertility, resulting in her ostracism by the Roma community, and the divorce of her husband.[43] The Court notes in its legal analysis the situation of vulnerability of the applicant as a woman of Roma origin and how the issue of sterilization and its improper use reflected this risk. The Court noted that her "vulnerability" was worsened by "widespread" negative attitudes regarding the relatively high birth rate among the Roma and the increased population living on social benefits.[44]

The European Court has also extended the vulnerability focus to victims of domestic violence, considering the failure of states to adequately protect them from harm as a form of discrimination. In *Opuz vs. Turkey*, the Court found the State responsible under several provisions of the European Convention on Human Rights for its

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38 D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R., ¶¶ 19–28, 175–210 (2007).

39 *Id.* ¶¶ 19–28, 198.

40 *Id.* ¶¶ 185–95, 196.

41 *Id.* ¶¶ 200–02.

42 V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H. R, ¶ 87-180 (2011)

43 *Id.* ¶¶ 8–20.

44 *Id.* ¶ 146.

failure to protect the applicant—Nahide Opuz—and her mother from an ongoing pattern of domestic violence, resulting in the death of the latter.[45] The Court found violations to the right to life under Article 2, the prohibition of torture, inhuman, and degrading treatment encompassed in Article 3, and the prohibition of discrimination under Article 14.[46] The applicant alleged that the "injuries and anguish" that were inflicted by her husband, and the failure of the authorities to protect her made her feel "debased, hopeless, and vulnerable."[47] In reaching its decision, the Court considered that Nahide Opuz was in a situation of vulnerability due to the ongoing acts of violence perpetrated against her, and a documented "culture of domestic violence" in Turkey.[48] The European Court recently applied similar reasoning in the domestic violence case of *Talpis vs. Italy*, expressly considering that the national authorities should take into account the different dimensions of the victim's *vulnerability*—insecurity, moral, physical, and material—and promptly initiate criminal prosecutions of aggressors when needed.[49]

This focus on vulnerability, or conditions which make a person vulnerable, is also illustrated in the text of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence [hereinafter Istanbul Convention][50] adopted in 2011, which codifies an expansive prohibition of the issue of

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45 *See* Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009).

46 *Id.* ¶¶ 128–202.

47 *Id.* ¶ 155.

48 *Id.* ¶ 99–100.

49 *See* Talpis v. Italy, App. No. 41237/14, Eur. Ct. H.R. (2017), ¶¶ 95–106; 126–32 (establishing that a positive obligation for a State to act occurs when the "authorities knew or ought to have known . . . [that there was a] real and immediate risk to the life of an identified individual from the criminal acts of a third party"); Bălsạn v. Romania, App. No. 49645/09, Eur. Ct. H. R. ¶ 57 (2017) (listing the State's obligations as consisting of reasonable measures that prevent mistreatment as well as effective official investigations into claims of mistreatment).

50 *See* Istanbul Convention, *supra* note 11, (defining in Article 3 "violence against women," "domestic violence," "gender," "gender-based violence against women," "victim," "women." Articles 4 and 5 list fundamental rights to equality and non-discrimination while mandating states to adopt necessary measures to prevent acts of violence against women by state and non-state actors. Article 6 calls parties to incorporate a gender perspective "to promote and effectively implement policies of equality between women and men and the empowerment of women." Article 12 mandates states to adopt actions to eradicate "prejudices, customs, and traditions" based on the inferiority of women. Article 53 requires parties to take all necessary measures to ensure the availability of restraining or protection orders for victims of all forms of violence).

violence against women, including economic harm and the "threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[51] The Convention in its Article 12 explicitly indicates that parties shall adopt measures to eradicate "prejudices, customs, traditions, and all other practices" based on the inferiority of women, and that any measures should take into account "the specific needs of persons made vulnerable by particular circumstances" and "place the human rights of all victims at their center."[52] Lastly, in the Council of Europe, it is also noteworthy to underscore the reports issued by the Human Rights Commissioner, highlighting the situation of vulnerability in Europe of persons based on a diversity of factors, including children, migrants, persons with disabilities, and the Roma.[53]

The Inter-American system itself has been structured to attend to the particular needs of persons and groups at increased risk to human rights violations. The system has created Rapporteurships devoted to offering attention to the needs of persons and groups considered in vulnerable conditions, including women; children; indigenous peoples; afro-descendent persons; persons deprived of liberty; migrants; and human rights defenders; among others.[54] The system also has a number of treaties adopted on behalf of specific groups, emulating the United Nations system in this regard, including women, those affected by disabilities, and older persons.[55]

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[51] *Id.* art. 3(a) (defining "violence against women" as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life").

[52] *Id.* arts. 12(1), 12(3) (requiring states to "take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men." "[M]easures taken pursuant to this chapter shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre").

[53] *See* COUNCIL OF EUROPE, COMMISSIONER FOR HUMAN RIGHTS, ANNUAL ACTIVITY REPORT 2015 25-33 (Mar. 14, 2016).

[54] *See* Activities of the Rapporteurships, Thematic and Country Reports and Promotion, Inter-Am. Comm'n H.R., Report, OEA/Ser.L/V/II. Doc. 48/(2015) [hereinafter 2015 IACHR Annual Report], http://www.oas.org/en/iachr/docs/annual/2015/TOC.asp [https://perma.cc/P5MG-2UFZ].

[55] The OAS has adopted a number of specialized treaties focusing on the situation of persons and groups in a position of vulnerability. These include the

The Commission has officially incorporated this approach in its strategic plan for 2017–2021, referring in particular to persons and groups in a situation of vulnerability, and has also added persons with disabilities and older persons to this consideration.[56] The approach has also been incorporated in the work of the Commission in both regional and country reports.[57]

The Inter-American Commission and the Court have also adopted a number of case decisions referring to persons in a situation of vulnerability. These bodies have referred explicitly to the term "vulnerability" in certain instances, and also generally discussed the situation of risk of specific groups and their need for a particularized focus when it comes to state measures. For example, in the case of *I.V. v. Bolivia*, the Inter-American Court found the state responsible for violations to the rights to personal integrity and liberty, dignity, private and family life, and access to information under the American Convention and other regional instruments for a sterilization without consent performed in a public hospital to the detriment of I.V.[58] The Court also found that the victim was subjected to inhumane and degrading treatment, resulting in the permanent loss of her reproductive capacity.[59] In its very detailed analysis, the Court expressed concern over the

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following: Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disability (1999), Inter-American Convention Against all Forms of Discrimination and Intolerance (2013), Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance (2013), Inter-American Convention on Protecting the Human Rights of Older Persons (2015).

[56] *See generally* Inter-Am. Comm'n H.R., Strategic Plan, *supra* note 7, at 31–36, 39–41 (naming the populations of special focus in its work priorities, including: indigenous peoples, women, migrants, refugees, stateless persons, victims of human trafficking, and internally displaced persons, freedom of expression, children and adolescents, human rights defenders, persons deprived of liberty, Afro-Descendants, lesbian, gay, bisexual, trans, and intersex persons, persons with disabilities, and older persons).

[57] *See, e.g.*, Inter-Am. Comm'n H.R., *Violence, Children, and Organized Crime*, OEA/Ser.L/V/II. Doc. 40/15, ¶¶ 53–67 (Nov. 11, 2015) (explaining that "one of the groups hardest hit by situations of inequality and social exclusion, and by violent and insecure environments, are children and adolescents"); Inter-Am. Comm'n H.R., *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II Doc. 49/13, ¶¶ 614–67 (Dec. 31, 2013) (illustrating that certain groups, such as Afro-descendant persons, specifically Afro-descendant women, are particularly vulnerable to human rights violations).

[58] I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 32, ¶¶ 118–270 (Nov. 30, 2016).

[59] *Id.* ¶¶ 257–70.

increased situation of risk or vulnerability of women in public health institutions, due to their historical discrimination, and negative gender stereotypes about their lack of capacity to adopt major decisions concerning their health and reproductive life.[60]

The Inter-American Court in other cases has recognized the increased vulnerability of displaced persons and human rights defenders in the Colombian armed conflict.[61] In its judgment related to the *Mapiripan Massacre vs. Colombia*, the Court refers to the situation of increased exposure to human rights violations of displaced persons and identifies women, heads of households, children, and older persons at particular risk to human rights violations; vulnerability that it considers reproduced by cultural prejudices that hinder the integration of displaced persons in their new societies.[62]

2.1.1. Considerations regarding the vulnerability approach in the inter-American and European systems

Even though the European and Inter-American systems have different institutional structures and styles of legal analysis, there are some commonalities in the identification of a specific person or group as fitting the rubric of "vulnerability." From the cases discussed previously, it seems that an important factor is evidence of a history of discrimination, exclusion, and risk to human rights violations. Other important variables include: whether the person is under state control or custody, the identification of a person or group as being at increased risk to human rights violations by the international community and United Nations bodies and the context

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[60] *Id.* ¶ 265.

[61] *See, e.g.*, Yarce et al. v. Colom., Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C), no. 326 ¶¶ 87–99; 185–91 (Nov. 22, 2016) (finding the state of Colombia responsible for several human rights violations by failing to protect the rights to life, integrity, and to be free from violence of several women human rights defenders working in the context of the Colombian armed conflict and the Comuna 13); Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colom., Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C), no. 270 ¶¶ 472–73 (Nov. 20, 2013) (recognizing that the State made reparations to victims of the armed conflict, specifically victims belonging to Afro-Colombian, Raizal, and Palenquera communities).

[62] Mapiripán Massacre v. Colom., Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C), no. 134 ¶¶ 175–77 (Sept. 15, 2005).

in which the violation takes place, which was exemplified by cases dealing with armed conflict settings).

In the author's view, there are some advantages to incorporating an approach considering conditions which render a person or group particularly vulnerable or at an increased risk to human rights violations from the viewpoint of effectiveness. First, it opens an institutional space to address the specific human rights situation and particularities of attention of the person involved. Second, it has allowed bodies in the European and Inter-American systems to exemplify what state obligations are in addressing the specific needs of these persons and groups through detailed jurisprudence. In the case of the European System, noteworthy lines of jurisprudence have developed with a focus on the Roma and LGBTI persons. In the case of the Inter-American system, this tendency is exemplified by the work on women's rights and indigenous peoples.[63] Case decisions in these areas illustrate concrete analysis and are part of a

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[63] *See, e.g.*, D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R. (2007) (holding that the State had not provided sufficient schooling arrangement safeguards for children from a historically disadvantaged population, specifically the ethnic group of Roma children); V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H. R, ¶ 154 (2011) (finding that the lack of safeguards for the reproductive health of a Roma woman resulted in a failure by the State to comply with its obligation to adequately protect the right to private and family life); N.B. v. Slovk., App. No. 29518/10, Eur. Ct. H. R. (June 12, 2012) ¶ 98 (holding that the sterilization of a Roma woman without her consent constitutes a breach of her right to private and family life); Karner v. Austria, App. No. 40016/98, Eur. Ct. H.R. (2003) ¶¶ 39–42 (rejecting the Government's argument that the protection of the traditional family unit validates discriminatory measures against same-sex couples seeking the right to succeed to a tenancy); Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, Eur. Ct. H. R., ¶ 36 (Dec. 21, 1999) (finding that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention); González et al. ("Cotton Field") v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 205 (Nov. 16, 2009) (holding that the State failed to comply with its obligations to investigate with due diligence the disappearance and death of three women found murdered in Ciudad Juarez, Mexico); Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II. (2011) (finding that the United States violated the rights to non-discrimination and to judicial protection of Jessica Lenahan and her three deceased daughters, as victims of domestic violence); Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) no. 245 ¶ 51, p. 99 (June 27, 2012) (holding that the exploration of petroleum in the Amazonian region where the Kichwa indigenous group lived constituted a violation of their right to property and culture); Mayagna (Sumo) Awas Tingni Community v. Nicar., Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) no. 79 (Aug. 31, 2001) 1, 82 (finding that the State violated the Mayagna (Sumo) Awas Tingni indigenous group's right to property).

body of work which reflects the realities for these groups in the field and at the national level.

Third, the identification of a specific person or group as *vulnerable* can also increase the participation of those persons in the system themselves and their mechanisms. In the case of the European System, a great number of women's rights experts participated in the drafting of the Istanbul Convention, and are now participating in its monitoring.[64] In the Inter-American system, at least one-third of the hearings granted per year are related to persons and groups at risk for human rights violations.[65]

In the Inter-American system, this has been very evident in the area of LGBTI issues. After the first judgment of the Inter-American Court of Human Rights on this issue, the case of *Atala Riffo and others vs. Chile*,[66] a specific Rapporteurship was created in 2014 to attend to issues concerning LGBTI persons; there has been a noticeable increase in the number of hearings on this issue before the Inter-American system; and an official core group of states which prioritizes LGBTI matters has been created.[67]

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[64] *See generally* Istanbul Convention, *supra* note 11. For more information on the drafting history of the Istanbul Convention, see Istanbul Convention Action against violence against women and domestic violence, *Historical Background*, https://www.coe.int/en/web/istanbul-convention/historical-background [https://perma.cc/KV92-MVSU] (explaining that the state implementation of the Convention is currently monitored by GREVIO, a body composed of elected experts in the areas of human rights, gender equality, violence against women, and domestic violence). For more information on GREVIO, see Istanbul Convention Action against violence against women and domestic violence, *About GREVIO – Group of Experts on Action against Violence against Women and Domestic Violence*, https://www.coe.int/en/web/istanbul-convention/grevio [https://perma.cc/V5ZJ-WRSE].

[65] *See, e.g.*, Inter-Am. Comm'n H.R., Schedules of Hearings 2015–2017, http://www.oas.org/en/iachr/activities/sessions.asp [https://perma.cc/4ZJF-AZ6H].

[66] *See generally* Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

[67] *See* 2015 IACHR Annual Report, *supra* note 54; Press Release, Inter-Am. Comm'n H.R, IACHR Welcomes Creation of CORE Group of States at the OAS (July 25, 2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/097.asp [https://perma.cc/6PUU-YYU9]. For examples of hearings that have taken place before the IACHR between 2005 and 2018 focused on LGBTI issues, see: 170˚ Period of Sessions, *Equal Marriage in the Region* (Dec. 5, 2018), https://www.youtube.com/watch?v=TnUU9ZImcNM; 169˚ Period of Sessions, *Violations of the Economic, Social, Cultural, and Environmental Rights of LGBTI Persons in the Region* (Oct. 2, 2018), https://www.youtube.com/watch?v=fnJMOAJlcMw&index=22&list=PL5Qlapy OGhXtxcMOpg35GCa2M7dJo_QVh&t=0s; 165˚ Period of Sessions, *Situation of*

Fourth, an approach considering "vulnerability" has paved the way for the adoption of a number of treaties addressing the concrete situation of persons and groups at increased risk of human rights violations. This has been particularly evident at the OAS level, with the adoption in the past six years of two Conventions specialized on racial intolerance, racism, and discrimination issues, as well as the first international treaty solely devoted to the rights of older persons.[68] The OAS is a very complex organization, integrated by an eclectic combination of cultures, legal traditions, languages, and policy interests. It is truly a key moment when the thirty-five OAS Member States adopt a new treaty or instrument, even when the treaties may have content flaws and voids. It is a reflection of regional priorities, values, and principles in which there is consensus and commitment of state action and attention, despite the typical implementation challenges.

The 2013 OAS Conventions on Discrimination are very laudable in including a groundbreaking and inclusive definition of discrimination, extending beyond the grounds traditionally recognized by international treaties and in codifying definitions of key concepts in discrimination law, such as indirect discrimination, multiple forms of discrimination, racism, and the problem of intolerance.[69] In its language, the 2015 OAS Convention on Older Persons solidifies a formal recognition of this group as rights-holders, motivating their full inclusion, integration, and

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Older LGBTI Persons in the Americas (Oct. 23, 2017), https://www.youtube.com/watch?v=PFKD5MFFirA&t=0s&index=34&list=PL5QlapyOGhXvdhUdWzbRmDhNQU-Fs3U-2; 156° Period of Sessions, Human Rights *Situation of LGBT Persons Deprived of Liberty in Latin America* (Oct. 23, 2015), https://www.youtube.com/watch?v=7_3YmhUZ_f0; 140° Period of Sessions, *Punitive Measures and Discrimination on the Basis of Sexual Identity in Caribbean Countries* (Oct. 26, 2010), http://www.cidh.org/audiencias/140/27.mp3.

[68] *See* Inter-American Convention on Protecting the Human Rights of Older Persons, ORGANIZATION OF AMERICAN STATES [hereinafter OAS Convention on Older Persons]; OAS Convention on Discrimination and Intolerance, *supra* note 11.

[69] *See* OAS Convention on Discrimination and Intolerance, *supra* note 11, Preamble, arts. 1–14 (defining "discrimination" as "any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise or one or more human rights and fundamental freedoms enshrined in the international instruments applicable to State Parties"); Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance, ORGANIZATION OF AMERICAN STATES (2013) Preamble, arts. 1–14 [hereinafter OAS Convention on Racism].

participation in society.[70] The Convention is groundbreaking in defining concepts such as ageing, abuse, negligence, integrated social and health care services, palliative care, and abandonment, and affirmatively advocating for the full enjoyment by older persons of civil, political, economic, social, and cultural rights.[71] The Convention codifies a number of classical rights for older persons, such as the rights to life, personal integrity, and to live free from discrimination. The Convention also includes a detailed list of rights which are very specific to the needs of older persons in the areas of long-term care and personal mobility, among others.[72]

Despite these laudable steps in case law and treaties, one lingering challenge is ensuring that a focus on vulnerability does not promote a stereotyped vision and treatment of the human rights realities of various persons and groups. This danger has been alluded to by various scholars.[73] It has been exemplified by the criticisms to the OAS Convention on Persons with Disabilities and its assistentialist approach, marking it as different from the empowerment focus of the equivalent United Nations Convention.[74] A correlated issue is that some of the regional Court judgments to date can seem contradictory in advancing the need for a

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[70] OAS Convention on Older Persons, *supra* note 68, preamble, arts. 1–3 (article 1 in particular indicates that "The purpose of this Convention is to promote, protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration, and participation in society . . . .").

[71] *Id.* arts. 2–4.

[72] *Id.* arts. 5–31.

[73] *See, e.g.*, Peroni & Timmer, *supra* note 37; MARTHA ALBERTSON FINNEMAN & ANNA GREAR, REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Ben Waters ed. 2013) (developing the "vulnerability thesis" and its potential as a new ethical foundation for law and politics).

[74] *See, e.g.*, Organization of American States (OAS), *General Observation of the Committee for the Elimination of Discrimination against Persons with Disabilities, regarding the need to interpret article I.2 (B) of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities (CIADDIS), in the framework of Article 12 of the United Nations Convention on Persons with Disabilities*, CEDDIS/doc.12 (I-E/11) Rev. 1 (Apr. 28, 2011) (entrusting this OAS committee to supervise the regional convention on persons with disabilities mandates states in this general observation to implement a legal approach based on decision-making, rather than legal incompetence, in consonance with article 12 of the United Nations Convention on Persons with Disabilities, and in contrast to article I.2 (b) of the Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disabilities); s*ee also* Inter-American Convention for the Elimination of All forms of Discrimination against Persons with Disabilities (CIADDIS), article I.2 (b) (June 7, 1999; Convention on the Rights of Persons with Disabilities, article 12, Dec. 13, 2006, U.N.T.S. vol. 2515, I-44910.

"vulnerability" focus, while at the same time advancing autonomy and participation concepts.[75]

The author considers that there should also be more documentation and research performed on whether such a particularized approach to human rights protection does contribute to addressing larger systemic issues such as structural discrimination. The Inter-American Court has begun alluding to the issue of structural discrimination and its importance to fully eradicate forms of exclusion in societies throughout the Americas. For example, the Court in its judgment in the case of Hacienda Brazil Verde Workers vs. Brazil, related to the practice of slave work in the state of Pará, identified criteria to determine whether there is "structural discrimination" in a particular case, including: i) whether the group has characteristics which are "immutable" or have been subjected to historical discrimination; ii) whether the group has faced a systemic or historical situation of exclusion, marginalization, or subordination which impede access to basic human development conditions; iii) that this situation of exclusion is concentrated in a specific geographic zone or is prevalent in the entire territory of a State; and iv) that persons belonging to the group at issue are victims of indirect discrimination or discrimination in practice due to state measures.[76] The author hopes to see more legal development in the future of the content of the term "structural discrimination" and its connection to the situation of persons which can be considered in a vulnerable social position.

In this sense and in the realm of treaties, the OAS Conventions on Discrimination do contain important principles applicable to persons in a situation of vulnerability, but the author notes the lack of a holistic approach which may challenge their effective enforcement by States. As indicated earlier, the Conventions are better at defining and identifying concepts than providing a roadmap to address larger structural issues in the area of discrimination.[77] When they are read integrally, it is evident that they are missing a comprehensive framework that captures all

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[75] *See, e.g.*, I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 32, ¶¶ 147–256 (Nov. 30, 2016).

[76] Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 3181, ¶¶ 80, 334–343 (Oct. 20, 2016).

[77] OAS Convention on Discrimination and Intolerance, *supra* note 11, Preamble, Articles 1–14 (reaffirming the general principles of anti-discrimination and tolerance); OAS Convention on Racism, *supra* note 69, preamble, arts. 1–14.

dimensions of the problem of discrimination, and the strategies needed to prevent and eradicate the same, at the structural and institutional levels. There also seems to be a contradiction between providing for multiple forms of discrimination, but then separating the concept of racial discrimination from other forms by dividing the original draft treaty in two. The Conventions also offer an abstract recognition of the collective experience of discrimination and intolerance, but miss language confirming that States have collective obligations, as well as individual ones in this area, which is an issue of primary importance for indigenous peoples and afro-descendent communities.

2.1.2. Vulnerability and Stereotypes

The issue of stereotypes has had increased coverage at both the Inter-American and European systems in recent years, but the efforts have been limited largely to fleshing out the relationship between vulnerabilities and stereotypes.

In its judgment in the case of *I.V. vs. Bolivia*, the Inter-American Court does discuss the issue of stereotypes in great detail, alluding to the negative social preconceptions of women as "vulnerable" persons, incapable of making quality decisions concerning their health.[78] Therefore, for the Court the notion of vulnerability is multidimensional, involving different risks to human rights violations when women are receiving treatment in public hospitals, including being the subject of harmful stereotypes. In the Inter-American Court judgment in *Artavia Murillo vs. Costa Rica*, the Court found a ban on in vitro fertilization incompatible with the American Convention, and established that this kind of restriction had differentiated negative impacts on both women and men who suffer from infertility due to social prejudices and stereotypes.[79] The Court alluded to the social expectations that both women and men face socially to have children, and how the suffering can be severe, hidden, and a disability in cases in which access to reproductive

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[78] I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 32, ¶¶ 187 (Nov. 30, 2016).

[79] *See* Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 294 (Nov. 28, 2012).

technology is the only option to conceive children.[80] In both its judgments of *Forneron vs. Argentina* and *Karen Atala vs. Chile*, the Inter-American Court also alludes to stereotypes which may negatively influence custody proceedings involving parents of different sexual orientations and income levels, in the form of "speculations, presumptions, stereotypes, generalized considerations on the personal characteristics of the parents, or cultural preferences regarding traditional concepts of the family."[81]

The Inter-American Court has also advanced in cases related to Mexico and Guatemala thorough analysis of how gender stereotypes about women and girls' conduct, dress, and behaviour often influence negatively the investigation of violence against women cases; and how this constitutes a prohibited form of discrimination under the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women [hereinafter Convention of Belém do Pará].[82] In an earlier case, *Maria Eugenia Morales de Sierra vs. Guatemala*, the Inter-American Commission also expressed its concern over the codification in national law of stereotyped roles for women and men within the marriage, resulting in discrimination, subordination, and violence against women within this institution.[83]

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[80] *Id.* ¶¶ 294–302 (holding that gender stereotypes negatively influence international human rights law and should be eliminated).

[81] *See* Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 109 (Feb. 24, 2012) (holding that determination of what is in the child's best interest should be based upon factors like parental behaviors and their impact on the well-being of the child instead of speculation); Fornerón and daughter v. Arg., Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶ 50 (Apr. 27, 2012) (holding that specific parental conduct and its negative influence on a child's well-being should be used to determine what is in a child's best interest).

[82] *See* Velásquez Paiz et al. v. Guat., Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 307, ¶¶ 173–199 (Nov. 19, 2015) (highlighting how gender stereotypes promote the repetition of violence against women and can harm the effective investigation of gender-based crimes); González et al. ("Cotton Field") v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 205, ¶ 401 (Nov. 16, 2009) (holding that gender stereotyping, which consists of preconceptions of personal attributes, results in subordination of women).

[83] *See* Maria Eugenia Morales de Sierra v. Guat., Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser./L/V/II.111 doc. 20 rev. (2001) (noting that institutionalizing gendered roles in society leads to greater prejudice against women).

The European Court has gradually adopted interesting cases shedding substantive light on the concept of stereotypes and their human rights repercussions. Some of the analysis of the Court has been focused on groups considered in a situation of vulnerability, and the negative effect of stereotypes on their life plans, while others have addressed the situation of persons which may be impacted by stereotypes in the exercise of their civil, political, economic, social, and cultural rights. In the case of *Konstantin Markin vs. Russia,* the applicant complained that he was discriminated against by the domestic authorities due to their refusal to grant him parental leave in violation of Article 14 of the European Convention, in connection with Article 8.[84] The applicant as a serviceman had no statutory right to three years' parental leave, while servicewomen were entitled to this benefit.[85] The Court ruled in favour of the applicant indicating that these differences in treatment perpetuated gender stereotypes, relegating women to the home and limiting men's family life.[86] In *Asku v. Turkey*, the Grand Chamber of the European Court considered that the negative stereotyping of a group in government-sponsored publications, such as the Roma, can impact their sense of identity; produce feelings of "self-worth and self-confidence;" and affect their private life.[87] In the case of *V.C. v. Slovakia* referred to earlier, related to a Roma woman who was sterilized without her consent at a public health hospital, the European Court refers to language hinting at stereotypes which drove this medical decision, calling the actions of hospital staff "paternalistic," in complete disregard of the choice and autonomy of the woman affected as a patient.[88]

The European Court also presents ground breaking analysis regarding gender and age specific stereotypes in its recent judgment

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[84] Konstantin Markin v. Russia [GC App. No. 30078/06, Eur. Ct. H.R. ¶¶ 9–41 (Mar. 22, 2012).

[85] *Id.* ¶ 131.

[86] *Id.* ¶ 141.

[87] *See* Asku v. Turk. [GC], App. Nos. 4149/04 and 41029/04, Eur. Ct. H. R., ¶ 58 (Mar. 15, 2012) (describing that the "prosecution had used stereotyped formula in all their requests for extension without submitting any evidence in support of their argument that the applicant might abscond or interfere with the investigation" and no alternative preventive measures were considered).

[88] V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H. R, ¶ 114-18 (2011); *see also* N.B. v. Slovakia, App. No. 29518/10, Eur. Ct. H.R. ¶ 71-81 (June 12, 2012).

of *Carvalho Pinto de Sousa Mourais v. Portugal*.[89] The applicant in the case suffered medical malpractice during a surgery, which left her with different physical ailments, including difficulty in having sexual relations, urinary incontinence, and depression.[90] She claimed that the Supreme Administrative Court discriminated against her on the grounds of her sex and age in lowering the amount of non-pecuniary damage awarded, considering that she "was already fifty years old at the time of the surgery and had two children, that is, an age when sexuality is not as important as in younger years, its significance diminishing with age."[91] In the applicant's opinion, by expressly referring to the fact that she was fifty, the Administrative Court undermined her right to a sex life and violated articles 8 and 14 of the European Convention.[92] The Court did side with the applicant ruling that the Administrative Court's assumption that sexuality is not as important for a fifty-year old woman and mother of two children as for someone younger, advanced traditional notions of female sexuality as linked solely to child-rearing purposes—a presumption which failed to take into consideration all the dimensions of a woman's sexuality.[93] Citing the CEDAW Committee and the UN Rapporteur on the Independence of Judges, the Court referred as well to gender-based prejudices and stereotypes in the judiciary in Portugal.[94]

The judgment of the European Court in the case of *Carvalho Pinto de Sousa Mourais* also hints that more rulings may come from the Court advancing an intersectional approach, considering the different factors which may expose a person to disparate treatment, including their sex and age; a tendency discussed in the next section of this article. The Court also clarified that cases falling under the rubric of Article 14 of the European Convention are not exclusively those addressing potentially arbitrary treatment between similarly situated persons. The Court confirms that the cases covered by Article 14 of the European Convention also include those in which a person or group is treated less favourably than another without proper justification, "even though the more favourable treatment is

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89 *See* Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., (July 25, 2017) (addressing the court's condemnation of the use of stereotypes about female sexuality in domestic judicial reasoning).

90 *Id.* ¶¶ 1–19.

91 *Id.* ¶ 49.

92 *Id.* ¶¶ 38–40.

93 *Id.* ¶ 52.

94 *Id.* ¶ 54.

not called for by the Convention."[95] Several scholars on the European system have remarked how the Court is moving away from a "comparative" approach in its interpretation of Article 14 to a broader focus including the situation of disadvantaged groups; a tendency which in the author's view is a necessary shift to contribute to the inclusion, autonomy, and social participation necessary for substantive equality.[96]

The author contends in this article that the increased focus and content to the notions of vulnerability and stereotypes by both systems is a positive tendency. However, there needs to be more legal analysis oriented towards establishing the connection between these two mutually reinforcing notions, and how these are connected to other legal issues such as the general prohibition of discrimination, and problems such as violence and its many forms. It is also important that the organs of both systems shift from a vulnerable focus to an empowerment and participatory approach for persons that are continuously excluded, disadvantaged, marginalized, and subjected to negative stereotypes. In this sense, persons and groups themselves have claimed their need to feel empowered before the Inter-American system and to not be treated as "victims" in the development of legal standards.[97] It is also key to encourage that the beneficiaries of this work participate more in hearings, on-site visits, third-party interventions, and in the filing of cases, and that they are made aware that these judgments and standards exist. This is vital to the effectiveness of these systems in the area of discrimination, aside from seeking the full compliance of the judgments in itself.

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95 *Id.* ¶ 44 ("The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.").

96 *See* Peroni & Timmer, *supra* note 37 (noting that focusing on broader inclusivity leads to greater social participation from marginalized groups); Senem Gurol, *Challenging Gender Stereotyping Before the European Court of Human Rights: Case of Carvalho Pinto v. Portugal*, EUROPEAN J. INT'L L.: TALK! (Sept. 21, 2017), https://www.ejiltalk.org/challenging-gender-stereotyping-before-the-ecthr-case-of-carvalho-pinto-v-portugal/#more-15561 [https://perma.cc/65FT-C72A] (stating that relying on stereotypes will prevent judges from making an objective assessment and will deny an applicant an individualized assessment).

97 *See, e.g.*, Hearing before Inter-American Commission on Human Rights, *Discrimination against Indigenous Women in the Americas*, (Mar. 28, 2012), http://www.oas.org/es/cidh/audiencias/advanced.aspx?lang=en [https://perma.cc/K64S-VLNE].

2.2. The Intersectionality Focus

It is also evident, in particular, in the Inter-American system, that there is an increasing *intersectionality* approach or a focus that considers the multiple identities and factors which may expose a given person to discrimination. This approach has been employed mostly in the case of women, in particular highlighting the specific risk factors they can suffer when they are girls,[98] and indigenous and afro-descendent.[99] This approach first found its expression in the Inter-American Commission reports concerning Canada[100] and

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[98] *See* Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 298 (Sept. 1, 2015) (recognizing Ecuador's failure to provide specialized care for Talia, who was infected with HIV due to a blood transfusion at a young age); González et al. ("Cotton Field") v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 205, ¶ 403-11 (Nov. 16, 2009) (finding that states have a duty to act with strict due diligence to search for girls reported as missing in known contexts of discrimination and violence).

[99] *See* Rosendo-Cantú et al. v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. Series (ser C) No. 216, ¶¶ 200–02 (Aug. 31, 2010) (noting that the State should have adopted special measures to protect the victim, who was a minor at the time of the events and is also indigenous, from violence and during the investigation of these events); Inter-Am. Comm'n H.R., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II., doc. 68 ¶¶ 195–97 (Jan. 20, 2007), https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf [https://perma.cc/YW2Z-Q5QM] (highlighting how the road to access justice can be more challenging for indigenous and afro-descendent women due to their sex, gender, race, ethnic background, and frequent socio-economic position); Inter-Am. Comm'n H.R., *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OEA/Ser.L/V/II. 124, doc. 67 ¶¶ 102–06 (Oct. 18, 2006), https://www.cidh.oas.org/pdf%20files/InformeColombiaMujeres2006eng.pdf [https://perma.cc/2CC5-6FNP] [hereinafter Violence Against Women in the Armed Conflict in Colombia] (stating that indigenous and Afro-Colombian women face a special risk to forms of racial discrimination, which makes them vulnerable to many human rights violations); Inter-Am. Comm'n H.R, *Report on the Rights of Women in Haiti to Be Free from Violence and Discrimination*, OEA/Ser.L./V/II, doc. 64 ¶ 90 (Mar. 10, 2009), https://cidh.oas.org/countryrep/Haitimujer2009eng/HaitiWomen09.Chap.IIIandIV.htm [https://perma.cc/T2HX-DQR9] (identifying minor age as a factor which can enhance the risk suffered by women to discrimination and violence).

[100] *See* Inter-Am. Comm'n H.R., *Missing and Murdered Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. doc. 30/14, ¶¶ 130–52 (Dec. 21, 2014), https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf [https://perma.cc/CDN2-54GS] (citing specific forms of discrimination faced by indigenous women in Canada and noting research findings that "Indigenous women in Canada face discrimination because of their gender and because of their indigenous identity").

Colombia,[101] when referring to the situation of indigenous and afro-descendent women, and its regional reports on the situation of afro-descendent persons[102] and access to justice for victims of violence against women.[103] It is important to note as well that the Convention of Belém do Pará requires states in its Article 9 to take into account the increased vulnerability women may face to violence on the basis of several factors, including their age, race, ethnic background, and situation of disability, among other variables.

Probably the case from the Inter-American Court that best illustrates this approach is *Gonzalez Lluy et al. v. Ecuador*, in which it found the state of Ecuador responsible for violations to the rights to life and personal integrity under the American Convention of Talía Gonzalez Lluy after being infected with HIV upon receiving a blood transfusion from a Red Cross Bank in a private health clinic when she was three years old.[104] The Court ruled that Talía Gonzales Lluy suffered discrimination derived from her situation as a person living with HIV, a child, a female, and living in conditions of poverty.[105] As part of this finding, the Court listed these not only as "vulnerability factors", but also as intersectional motives that increased her discrimination and stigmatized her as a person living with HIV.[106]

Perhaps the most important legacy of using the intersectional approach at the Inter-American system has been opening the door for encouraging states to pursue a holistic approach, considering the

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101 *See Violence Against Women in the Armed Conflict in Colombia*, *supra* note 99, at ¶103 ("Women from the indigenous and Afro-Colombian population suffer multiple/intersectional discrimination on the basis of gender, race, color and ethnic origin and as internally displaced persons . . . .").

102 *See* Inter-Am. Comm'n H.R., *The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II. doc. 62, ¶¶ 59–80 (Dec. 5, 2011) https://www.oas.org/en/iachr/afro-descendants/docs/pdf/afros_2011_eng.pdf [https://perma.cc/2TZT-TXMV] (explaining various factors which contribute to discrimination of the Afro-descendant population and that Afro-descendant women have suffered "a triple historic discrimination based on their gender, extreme poverty and race").

103 *See* Inter-Am. Comm'n H.R., *Access to Justice for Women Victims of Violence in the* Americas, *supra* note 99, ¶¶ 195–97 (showing that there is very little knowledge in Central America about the laws supporting international women's rights).

104 Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C, No. 298, ¶¶ 64-154 (Sept. 1, 2015).

105 *Id.* ¶ 291.

106 *Id.* ¶ 290 (explaining that discriminatory factors work together to exacerbate unfair treatment).

underlying factors of discrimination that originate and exacerbate violence. In its Canada report, the Commission advanced these principles, referring to the work of the United Nations Special Rapporteur on Violence against Women, its causes and consequences, highlighting that "interpersonal, institutional and structural forms of violence perpetuate gender inequalities, but also racial hierarchies, ethnic group exclusionary practices and allocations of resources that benefit some groups of women at the expense of others."[107] For the Inter-American Commission, this approach overall entails addressing the past and present structural inequalities confronted by different persons and groups which have been the subject of historical discrimination.[108] It is noteworthy as well that both of the recently adopted discrimination conventions of the OAS recognized the concept of "multiple or aggravated discrimination" as "any preference, distinction, exclusion, or restriction based simultaneously on two or more" of the prohibited factors recognized in Article 1.1 in the Convention.[109] As indicated earlier, the list of prohibited factors included in Article 1.1 of said instrument is very extensive, including new ones for international treaties such as sexual orientation, gender identity and expression, cultural identity, political opinions, and mental or physical health condition.[110]

In the European System, the case decision of *B.S. v. Spain* could signal the beginning of more legal developments concerning intersectionality issues.[111] In this case, the allegations focused on a woman of Nigerian origin who was stopped by the police while working as a prostitute in the outskirts of Palma de Mallorca.[112] The

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[107] Inter Am. Comm'n H.R., *Missing and Murdered Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. doc. 30/14, ¶ 141 (Dec. 21, 2014), https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf [https://perma.cc/CDN2-54GS].

[108] *Id.* ¶ 149 (stating that past and present inequalities must be corrected to address violence against women holistically).

[109] *See* OAS Convention on Discrimination and Intolerance, *supra* note 11, art. 1.3; OAS Convention on Racism, *supra* note 69, art. 1.3.

[110] *See* OAS Convention on Discrimination and Intolerance, *supra* note 11, art. 1.1.

[111] *See* B.S. v. Spain, App. No. 47159/08, Eur. Ct. H.R., ¶¶ 58–63 (July 24, 2012) (requiring State authorities to adopt all reasonable measures to identify whether there were racist motives when investigating violent incidents); *see also* Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., (July 25, 2017) (concerning the reduction of a compensation award to the applicant because of stereotypes based on her age and gender).

[112] *See* B.S. v. Spain, App. No. 47159/08, Eur. Ct. H.R., ¶¶ 6-10 (July 24, 2012).

applicant claimed that the national police both verbally and physically abused her when they stopped and questioned her.[113] She also alleged that the police discriminated against her on account of her skin color and gender, claiming that other women with a "European phenotype" carrying on the same activity had not been approached by police.[114] The Court found a violation of Article 14 of the Convention, taken in conjunction with Article 3, since the domestic courts failed to take into account "the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute" therefore failing to adopt all possible measures to determine whether a discriminatory attitude played a role in these events.[115] Even though the Court does not refer to the concept of *intersectionality* per se, the case might signal the beginning of a consideration of the connection between different motives, identities, or factors which can expose a person to discrimination. As indicated earlier, the European Court's decision in the case of *Carvalho* could be considered as part of this tendency, due to the allegations concerning the sex and age of the victim.[116]

In the Inter-American system an important contribution of the inter-sectional approach has been evident in the realm of reparations. In this sphere, the Inter-American Court has been moving towards an approach towards reparations that is more transformative and intersectional in nature, as opposed to restitution-based, considering the contexts of structural discrimination and inequalities that often foster the human rights violations seen by the Court.[117] As it is, it is a Court well-recognized for its expansive and evolving approach to reparations.[118]

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113 *Id.*

114 *Id.* at ¶ 29.

115 *Id.* at ¶ 62.

116 *See* Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., ¶¶ 52–54 (July 25, 2017) (finding that the Portuguese Supreme Administrative Court based their ruling on unfounded assumptions that reflect a traditional idea of female sexuality).

117 *See* González et al. ("Cotton Field") v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 205, ¶ 450 (Nov. 16, 2009) (recognizing the need for rectification measures to address the context of structural discrimination that lead to the events, as opposed to reparation solely based on restitution).

118 *See, e.g.*, Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples*, 25 DUKE J. COMP. & INT'L L. 1, 3 (2014), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1465&context=djcil [https://perma.cc/5DGN-TYFE] (recognizing the Inter-American court as becoming a world leader in the adjudication and redress of indigenous claims,

For example, in the case of *Ines Fernandez Ortega*—in which a 27-year old indigenous woman was raped by members of the Mexican Army—the Court found that the victim had faced multiple forms of discrimination on the basis of her gender, race, and socio-economic status which increased her risk to rape, and ordered the State to implement permanent training programs for the judiciary and the armed forces to prevent these acts, and investigate these cases with an ethnic and gender perspective.[119]

An important challenge inherent in the "intersectional approach" is the need for States to have guidelines and content on how to best reflect it in their legislative and public policy efforts, and how to best promote an adequate enforcement. In the author's view, it is key to balance well the incorporation of an "intersectional" approach with the need of specific persons and groups to have specialized attention at the national level, such as women and children. The more intersectional legislation and public policies become, the less specialized they can turn to the point of dilution. It is important that bodies such as the Inter-American Commission and Court, as well as the European Court take advantage of future cases to issue decisions which exemplify how an intersectional approach should be reflected in theory and in practice.

2.3. The Identification of New Prohibited Motives of Discrimination

In the Author's view, one of the most important tendencies in the area of discrimination has been the flexible reading of discrimination clauses in regional treaties to identify new prohibited motives of discrimination. This tendency has been very well illustrated in the case law of both the European and Inter-American

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influencing authorities across the globe); Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1313&context=faculty [https://perma.cc/8E9Q-M5QA] (recognizing efforts from the Inter-American Court to establish reparative schemes as the only international human rights body with binding powers that consistently orders equitable remedies in conjunction with compensation).

[119] *See* Rosendo-Cantú et al. v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. Series (ser C) No. 216, ¶¶ 308 (Aug. 31, 2010) (ordering the State to continue implementing training programs to promote the diligent investigation of cases of sexual abuse against women, guided by a gender and ethnic perspective).

systems.[120] The developments that will be described below from both the European and Inter-American Courts have also paved the way for the recently adopted OAS Conventions and the Istanbul Convention to recognize new motives that can be used to discriminate, as described earlier.

In the European system, the line of caselaw related to sexual orientation and gender identity have been extremely important in this regard. For example, in *Karner vs. Austria*,[121] the applicant alleged that the Supreme Court's decision to not recognize his right to succeed to a tenancy after the death of his companion constituted discrimination on the basis of his sexual orientation in breach of Article 14 of the European Convention, in conjunction with Article 8.[122] The Court underscored in its analysis by explaining that for purposes of Article 14, a difference in treatment is discriminatory if it lacks an "objective and reasonable justification", "does not pursue a legitimate aim", and there is "no reasonable relationship of proportionality between the means employed and the aim" pursued.[123] The Court emphasized in particular the need for "very weighty reasons" to be advanced for a difference in treatment on the grounds of sexual orientation to be compatible with the European Convention, even though sexual orientation is not listed among the prohibited grounds in Article 14.[124] Based on this analysis, the Court

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120 *See, e.g.*, Karner v. Austria, App. No. 40016/98 Eur. Ct. H.R., ¶ 27 (2003) (considering the difference in treatment of homosexuals as regards succession to tenancies under Austrian law); Kiyutin v. Russia, App. No. 2700/10, 53 Eur. H.R. Rep. 26 (2011) (considering allegations that the applicant's residence permit was denied because he tested HIV-positive); Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012) (considering allegations that the applicant's family suffered from discriminatory treatment and arbitrary interference in her private and family life due to her sexual orientation, resulting in the loss of care and custody of her daughters); Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 3181 (Oct. 20, 2016) (concerning slavery-like working conditions, human trafficking, and structural discrimination based on economic position).

121 For a discussion on the alleged violation of Article 14 of the Convention taken in conjunction with Article 8, see Karner v. Austria, App. No. 40016/98 Eur. Ct. H.R. ¶ 27 (2003).

122 *See id.* ¶ 3.

123 *See id.* ¶ 37 ("The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised . . . .").

124 *Id.*

found that the government had not advanced "convincing and weighty reasons" justifying a narrow interpretation of the Rent Act at issue.[125]

The European Court has also recognized other grounds as prohibited under Article 14 of the European Court of Human Rights. In *Kiyutin vs. Russia*, the applicant presented allegations claiming discrimination based on health status in his application for a Russian residence permit.[126] As part of this process, he had to undergo a medical examination in which he tested positive for HIV, resulting in the rejection of his application.[127] In its analysis of whether the applicant's health status fell under the "[O]ther status" clause within the meaning of Article 14, the Court considered that the list of discriminatory factors set out in Article 14 is not exhaustive and that this open "interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent . . . ."[128] Therefore, the Court found that a distinction based on account of a person's health status, including conditions such as HIV infection, should be covered by the term "[O]ther status" in the text of Article 14 of the Convention.[129] In its application of a more rigorous standard of review, the Court placed heavy emphasis on the marginalization that persons infected with HIV have suffered historically.[130]

A landmark ruling of the Inter-American Court in this regard was in the case of *Atala Riffo and Daughters vs. Chile*.[131] In this case, the petitioners alleged that the Chilean State was responsible for human rights violations committed amidst a custody proceeding where Karen Atala, a well-known judge, lost custody of her three daughters M., V., and R., based on her sexual orientation by means of a Supreme Court of Justice decision. In ruling in favor of the petitioners, the Inter-American Court found for the first time that discrimination on the basis of sexual orientation and gender identity

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125 *Id.* ¶ 42.

126 *Id.* ¶ 3.

127 *See* Kiyutin v. Russia, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 9 (2011) (explaining that the applicant was required to undergo a medical examination following his application for a residence permit, in which he tested HIV positive, and consequently his application was denied).

128 *Id.* ¶ 56.

129 *Id.*

130 *See id.* ¶ 64 ("Ignorance about how the disease spreads has bred prejudices which, in turn, has stigmatised or marginalised those who carry the virus.").

131 *See generally* Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012)

are comprehended within the phrase "other social condition" under Article 1.1 of the American Convention.[132] The Inter-American Court also found for the first time that distinctions based on sexual orientation should be subjected to a rigorous scrutiny, demanding from the State the presentation of very weighty reasons to justify that the decision examined was not based on discrimination.[133] It is important to note the significant influence of European Court judgments in the resolution of this case by the Inter-American Court, the first for the Inter-American system on discrimination on the basis of sexual orientation and gender identity.[134]

More recently, the Inter-American Court recognized poverty as a discrimination factor prohibited under Article 1.1 of the American Convention in its judgment in the case of *Hacienda Brazil Verde vs. Brazil*, related to the practice of slave work.[135] The Court alludes to the different categories comprehended under Article 1.1 to which poverty is related to, including economic position and social origin, and how this issue can be related to discrimination based on multiple grounds.[136] The Court presents very thorough analysis related to the link between poverty, slave labor, and human trafficking, and how poverty curbs the exercise of basic human rights, and impedes persons from living a life of dignity and autonomy.[137]

The Author has indicated previously in her scholarship that an open interpretation of the non-discrimination clauses in regional treaties is a key gain for legal standards related to discrimination,

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[132] *See id.* ¶ 91 ("[N]o domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.").

[133] *See id.* ¶ 124 (shifting the burden of proof to the State authority to show that its decision does not have a discriminatory purpose or effect).

[134] *See id.* (referring to cases from the European Court of Human Rights); Karner v. Austria, App. No. 40016/98 Eur. Ct. H.R., ¶ 37 (2003) (reiterating that, under Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification); Kozak v. Pol., App. No. 13102/02, Eur. Ct. H. R., ¶ 92 (2010) ("Where a difference of treatment is based on . . . sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realizing the aim sought but it must also be shown that it was necessary in the circumstances.").

[135] *See generally* Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 3181, ¶¶ 97 (Oct. 20, 2016).

[136] *Id.* ¶ 50.

[137] *Id.* ¶ 54.

and for sectors and communities particularly exposed to human rights violations.[138] This facilitates the recognition of new forms of discrimination which may not yet be acknowledged by the international community, or that may be in an incipient stage of recognition. It echoes also the universal system tendency.[139]

In the Author's view, it is important that regional human rights protection systems are responsive to the experience of marginalization that certain groups of the population face. In the same line, the author considers that there is a need to interpret the regional human rights treaties as "living" documents, in light of the current times and emerging forms of discrimination, taking into account the evolving nature of the international human rights law system, its values, and standards. It is also paramount that the regional protection systems offer an expansive interpretation to general phrasing in non-discrimination provisions of regional treaties because these treaties have more ratifications than the new ones adopted by the regional systems.

As illustrated by the cases referred to above, the history of discrimination, marginalization, and exclusion suffered by a given group of the population based on a specific ground is a factor of paramount importance in determining whether certain distinctions should be considered *suspect* for judicial review purposes. However, it is key that both the Inter-American and European Court identify more clearly which is the criteria to consider a new factor of discrimination as prohibited under the leading treaties, and which of these merits suspect analysis**.** It is also key to continue underscoring that major provisions—such as Article 1.1 of the American Convention and Article 14 of the European Convention—include situations in which certain groups of the population receive treatment which is disadvantageous in society.

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138 *See* Celorio, *The Case of Karen Atala and Daughters*, *supra* note 27 (discussing the legacy of the Inter-American Court of Human Rights judgments regarding women's rights issues and the interrelated problems of discrimination and violence against women, along with the scope of state obligations to prevent, investigate, sanction and offer reparations for these acts).

139 *See, e.g.*, General Comment No. 20 on Non-discrimination in Economic, economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, 42nd Sess., E/C.12/GC/20 ¶¶ 15–35 (July 2, 2009) (listing prohibited grounds of discrimination, including those explicitly recognized in treaties and those that could be considered implicit, and emphasizing that the nature of discrimination varies according to context and evolves over time).

The case decisions described above illustrate how regional precedent can be combined and interpreted in a way that offers the most legal protection to persons who have and still suffer serious forms of discrimination. The adoption of the OAS Discrimination Conventions and the Istanbul Convention also offer an important opportunity for these systems to dialogue with states over the components of a comprehensive framework that captures all dimensions of the problem of discrimination, and the strategies needed to prevent and eradicate the same, at the structural and institutional levels.

2.4. Discrimination, violence, and due diligence

One important positive for the Inter-American and European Systems has been the adoption of a number of rulings recognizing important linkages in the areas of discrimination and violence, as well as the duty of states to act with due diligence to prevent both of these human rights issues.

The Inter-American Court and Commission have adopted landmark cases advancing key legal standards confirming the link between discrimination and violence against women, and reaffirming the duty of states to act with due diligence to address these acts.[140] Regarding the standard of due diligence, the rulings have aimed to shed light on the content of the obligations to prevent, investigate, sanction, and offer reparations. These rulings have

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[140] *See, e.g.*, González et al. ("Cotton Field") v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 205 (Nov. 16, 2009); Ines Fernandez Ortega v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., Series. (ser. C, No.) No. 205, ¶ 450 (Nov. 16, 2009); Ines Fernandez Ortega v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); Maria da Penha Fernandez v. Braz., Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser./L/V/II.111 doc. 20 (2001); *see also* Women Victims of Sexual Torture in Atenco v. Mex., Merits, Reparations and Costs, Inter-Am. Ct. H.R. Series (ser. C) No. 371, ¶¶ 177–305 (Nov. 28, 2018) (finding the state responsible for acts of sexual violence, torture, and rape committed against 11 women during police operations and while arrested, as a method of social control; acts that were not properly investigated with due diligence and a gender perspective); López Soto et al. v. Venez., Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series. (ser. C) No. 372, ¶¶ 124–200 (Sept. 26, 2018) (attributing international responsibility to the State for acts committed by an individual, by concluding the authorities knew of the victim's disappearance and the identity of the aggressor, and failed to act with due diligence to search and prevent disturbing acts of sexual violence, slavery, and torture).

underscored the duty to address forms of violence, the discrimination that underlies these acts, as well as the need for a concrete focus on specific groups of women that are particularly at risk of human rights violations, including girls, adolescents, indigenous, and afro-descendent.

In regards to the principle of due diligence, the Commission in its *Jessica Lenahan vs. United States* decision, concerning the failure of police authorities to enforce a domestic violence protection order resulting in the death of three girls, recognized four components of the same.[141] First, the Commission indicated that a state "[M]ay incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances."[142] Second, the Commission underscored the link between discrimination, violence, and due diligence, highlighting that a States' duty to address violence against women also implicates measures to prevent and respond to the discrimination that perpetuates this problem.[143] For the Commission, States are also required to adopt measures to modify social and cultural patterns of conduct of men and women and to eradicate prejudices, customary and other practices based on the supposed inferiority of women or stereotyped notions of their roles. Thirdly, the Inter-American Commission highlighted the link between the duty to act with due diligence and the state obligation to guarantee access to adequate and judicial remedies for victims and their family members when they suffer acts of violence.[144] Fourth, in the adoption of measures to prevent all forms of violence, the Commission indicated that states have a duty to consider the particular risks of human rights violations faced by certain groups of women, based on a number of factors; including girls and women of ethnic, racial, and minority groups.[145]

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141 *See* Jessica Lenahan (Gonzales) et al. v. United States. Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II., ¶¶ 126–127 (2011) (highlighting four accepted principles in the evolving law and practice related to the application of the due diligence standard in cases of violence against women).

142 *Id.* ¶ 126.

143 *Id.*

144 *Id.*

145 *Id.* ¶ 127 (holding that States are required to consider the enhanced risk to discrimination faced by certain group of women due to their race and ethnicity, among other factors).

One important contribution of the use of the due diligence standard is the beginning of a definition of obligations of state authorities over the acts of non-state actors. Many of the cases ruled by the Inter-American Commission and the Court in this area have dealt with the acts of private individuals or acts where it could be presumed that private individuals were involved.

The European Court cases have also been illustrative in this tendency. The European Court has issued a number of rulings finding states responsible for failing to protect different victims from imminent acts of violence perpetrated by private individuals when it was considered that the authorities knew of a situation of real or immediate risk to the wife, her children and/or other family members, created by the estranged partner, and the authorities failed to protect them from harm. In ruling on the question of knowledge, important elements considered by the Court have been that the state authorities had already detained the aggressor,[146] assisted the victim and/or her family members in the filing of complaints,[147] and instituted criminal proceedings[148] in response to the victim's and/or her family members repeated contacts with the authorities.

When this European Court line of cases is reviewed as a whole, a number of important principles can be identified which shed light on the content and scope of the obligation of a state to protect persons against private acts of violence; standards also applicable to the prevention of discrimination. The protection obligation is one of means and not results, meaning that a state can be responsible when it fails to adopt reasonable measures that had a real prospect of altering the outcome or mitigating the harm.[149] Understanding the context and the victims is key; in the case of domestic violence, its hidden nature and prevalence may require attention from the

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146 *See* Branko Tomasic and Others v. Croat., App. No. 46598/06, Eur. Ct. H.R., ¶¶ 7–17 (2009).

147 *See* Kontrová, v. Slovk., App. No. 7510/04, Eur. Ct. H.R., ¶¶ 8–13 (2007).

148 *See* Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009) (highlighting state failures to properly investigate the intentional killing and a series of domestic violence incidents even though the authorities had knowledge of the identity of the aggressor).

149 *See id*. ¶ 136 (reiterating that the local authorities' failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage state responsibility); E & Others v. United Kingdom, App no. 33218/96, Eur. Ct. H.R., ¶ 99 (2002) (emphasizing that the test under Article 3 does not require it to be shown that "but for the failing of the public authority, ill treatment would not have happened").

authorities, even in cases where complaints have been withdrawn.[150] Lastly, the failure by the police and judicial authorities to protect a woman from domestic violence breaches her right to equal protection—the failure need not be intentional.[151]

3. OPPORTUNITIES AND CHALLENGES: THE ROAD AHEAD IN THE REGIONAL PREVENTION AND RESPONSE TO DISCRIMINATION

It is important to note that the effectiveness of a regional human rights system to address complex discrimination issues is driven not only by its legal standards, but also by the context in which the legal standards are enforced, and on the strength of its institutions. In this sense, it is important for both the Inter-American and European systems to find creative ways to face contemporary political and institutional challenges.

One important institutional obstacle is the enforcement problem of case rulings. In Europe, experts in the system have identified a number of states that have lingering enforcement issues, and compose also the largest caseload of the European system.[152] In the Americas, the enforcement of judgments is very mixed, being particularly weak in the areas concerning the administration of justice and impunity issues.[153] Important strategies have been employed by the different systems to improve compliance with judgments, including the adoption of Protocol 16 by the European Court of Human Rights and the Conventionality Control Doctrine of the Inter-American Court of Human Rights.[154] The Inter-

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150 Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009) (noting that the crimes committed by the perpetrator were sufficiently serious to warrant preventive measures and therefore the local authorities could have foreseen a lethal attack).

151 *See id*. ¶ 191 ("It transpires from the above-mentioned rules and decisions that the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.").

152 *See* Anagnostou & Mungiu-Pippidi, for more analysis *supra* note 26.

153 *See* Alexandra Huneeus, *supra* note 26 (showing that enforcement of issues remains weak in the Americas); Dulitzky, *supra* note 26 (identifying needed measures to enhance the inter-American system of human rights).

154 *See* Protocol 16 to the European Convention of Human Rights and Fundamental Freedoms, art. 1, https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf [https://perma.cc/9CVU-XJGV] (addressing the content and grounds for advisory opinions); Brussels Declaration, *High-Level Conference on the Implementation of the*

American Commission on Human Rights has identified the supervision of compliance of rulings and judgments as one of the priority areas in its new strategic plan between 2017 and 2021, and the Inter-American Court has created a section solely devoted to this issue.[155] It is important to follow closely strategies employed by these systems to improve compliance with judgments. In the Americas system, a related obstacle is the significant delays that affect the processing of case petitions.[156] These institutional challenges negatively affect their overall work in the area of discrimination and any future strategies should consider the intricacies and complexities of addressing discrimination issues at the national level.

These systems are also facing enormous political pressures today from different states, which affect their daily operations and effectiveness. Problems of this kind are inherent in these systems as they are inter-governmental in nature. Their proximity to states is both a challenge and an opportunity of influence.[157] In the case of

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European Convention on Human Rights, our Shared Responsibility (Mar. 27, 2015), https://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Declaration-Brussels_EN.pdf [https://perma.cc/FER8-J6EN] (underlining the importance of prompt and full execution by State parties of the Court's judgments in consonance with Article 46 of the Convention); Eduardo Ferrer McGregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights,* 109 Am. J. Int'l L. Unbound 93 (2015), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CC71A5517CAF78AA4F73FECEC1A041EC/S2398772300001240a.pdf/conventionality_control_the_new_doctrine_of_the_interamerican_court_of_human_rights.pdf [https://perma.cc/QDQ4-QC6B] (describing the "conventionality control" doctrine which creates the international obligation on all state parties to the ACHR to interpret any national legal instruments in accordance with the ACHR); *see also* HANNUM et al., *supra* note 9, 552–66 (discussing the present work of the Committee of Ministers at the Council of Europe and the development of the conventionality control doctrine by the Inter-American Court of Human Rights, as strategies advanced by both regions to promote the full compliance of judgments).

155 *See* Inter-Am. Comm'n H.R., Strategic Plan, *supra* note 7, at 62; Inter-Am. Ct. H.R., Annual Report 2016, at 72–77, http://corteidh.or.cr/sitios/informes/docs/ENG/eng_2016.pdf [https://perma.cc/EAR6-7SPH].

156 *See* Inter-Am. Comm'n H.R., Strategic Plan, *supra* note 7, at 51–52, (explaining that case-processing delays are one of the most challenging issues faced in the present by the Inter-American Commission on Human Rights to fulfill its protection and promotion mandates).

157 For more discussion on the relationship of States with the regional human rights protection systems in the Americas and Europe, see Pinto, *supra* note 24; Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights*

the Americas, two states have already withdrawn from the American Convention, and there is a group of states that is constantly criticizing the measures and pronouncements issued by the Inter-American Commission.[158] Venezuela has already expressed its intention to withdraw from the OAS Charter.[159] This is compounded by one of the most public financial crisis the Inter-American Commission has faced in its history, and difficulties in balancing its protection and promotion work.[160] In Europe, the tensions with Russia and the exit process of the United Kingdom from the European Union bring fears of what kind of impact this all will have in the work of the European Court and its operations.[161]

Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter, *supra* note 27.

158 *See* Pinto, *supra* note 24 (identifying as a system challenge the lack of universal ratification of the leading treaties and limited acceptance of the Court's jurisdiction).

159 *See Official Letter from Government of Venezuela announcing intention to withdraw from OAS Charter* (Apr. 27, 2017) http://albaciudad.org/wp-content/uploads/2017/04/CARTA-OEA.pdf [https://perma.cc/WGV6-9J24] (letter in which Venezuela formally announces its intention to withdraw from the OAS Charter and expresses concerns over the current work and priorities of the OAS).

160 *See* Inter-Am. Comm'n H.R., Press Release No. 069/16, *Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff* (May 23, 2016) http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp [https://perma.cc/28QR-FDXT] (noting the creation of a LGBTI Core Group at OAS); CEJIL, CLADEM, IPAS, AIDA, WOLA and others, *Observations on the Process of Reflection on the Workings of the Inter-American Commission with a View to Strengthening the Inter-American Human Rights Protection System* (Mar. 15, 2012), https://cejil.org/en/civil-society-observations-strengthening-inter-american-system [https://perma.cc/CVC4-ZRSK] (showing that groups are attempting to develop guidelines that will increase enforceability of judgments); Katya Salazar, *Between Reality and Appearances*, 7 APORTES DPLF MAG 16 Number 19 (Apr. 2014), http://www.dplf.org/sites/default/files/aportes_19_english.pdf [https://perma.cc/H7Q3-2NDK] (citing problems faced by the Inter-American Commission on Human Rights, such as the "ongoing challenge of maintaining delicate balances and upholding values that at first glance might appear to contradict one another").

161 For more reading, see Abraham Joseph, *Russia's Love-Hate Relationship with the European Court of Human Rights*, THE WIRE (Feb. 15, 2017), https://thewire.in/108281/what-the-european-court-of-human-rights-latest-ruling-means-for-russia/ [https://perma.cc/77B8-2J32] (describing the difficult relationship between Russia and the European Court of Human Rights—Russia has refused requests from the European Court of Human Rights for "strategic reasons"); Steven Greer, *The Human Rights Implications of Brexit*, U. BRISTOL L. SCH. BLOG (July 1, 2016), http://legalresearch.blogs.bris.ac.uk/2016/07/the-human-rights-implications-of-brexit/ [https://perma.cc/2GN2-TM38] (indicating how the

Despite the challenges mentioned above, the author believes these two systems have important opportunities to contribute with quality legal standards to prevent and respond to the issue discrimination and its many forms at the national level.

Firstly, the standards already set by these regional protection systems should be expanded and reconciled with the contexts in which discrimination is taking place. It is key that the systems address concretely cornerstone issues such as hate speech, xenophobia, structural discrimination, racially-motivated bias and violence, and gender-based discrimination, which are greatly affecting the Americas and Europe. There is also important terminology and forms of violence which need more analysis and definition by the regional protection systems, such as sexual and labor harassment, and violence occurring in the realm of technology.

In the case of hate speech in particular, the inter-American system has very solid standards on freedom of expression matters largely carved by its full-time Rapporteurship,[162] and as discussed throughout this article, the system has also adopted important case decisions related to the prohibition of discrimination. However, the relationship between these two areas of international law and its applicability to the issue of hate speech is still very unsettled.[163] There is a need to define a well-articulated legal approach to hate speech when it is directed against a class or group of persons protected by international and regional treaties. Events in Charlottesville, VA, and other localities in the Americas concerning racially-motivated hate speech inciting to violence have renewed the need to clarify the content of hate speech, and the correlative limitations and contours of the right to protest when racially-motivated speech is present.[164] The Inter-American system has a

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human rights implications of Brexit will be difficult to predict and are dependent on a number of factors).

[162] *See generally* Office of the Special Rapporteurship on Freedom of Expression, Annual Report 2016, OEA/Ser.L/V/II. Doc. 22/17 (Mar. 15, 2017), http://www.oas.org/en/iachr/expression/docs/reports/annual/AnnualReport 2016RELE.pdf [https://perma.cc/C2PP-3QMG].

[163] For some analysis from the Inter-American System of Human Rights on the issue of hate speech, see Inter-Am. Comm'n H.R., *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OEA/Ser.L/V/II.rev.1 Doc. 36 (Nov. 12, 2015), paras. 213–261 (expressing the concern of the Inter-American Commission on Human Rights over the high levels of violence against individuals and groups in the LGBTI community, and the need for more adequate prevention and response measures from states).

[164] *See, e.g.*, Inter-Am. Comm'n H.R., Press Release No. 124/17, *IACHR Repudiates Hate Speech and Violence in Charlottesville, Virginia, United States* (Aug. 18,

very important opportunity to carve legal standards and guidance on the legality of those limitations, which may be imposed while also safeguarding their flexible interpretation of freedom of speech rights. Both the Inter-American and European Court should also take advantage of future cases to exemplify which discriminatory content can be considered "hate speech" and when restrictions to freedom of expression should be considered proportional, especially in cases in which the speech at issue is not inciting to violence or crimes.[165]

In regards to gender-based discrimination, it is key that both the European and Inter-American systems begin setting legal positions on problems such as the use of "gender ideology" to promote patriarchalism and traditional notions of the family.[166] It is

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2017), http://www.oas.org/en/iachr/media_center/PReleases/2017/124.asp [https://perma.cc/7K4S-FJX] (including a strong condemnation from the Inter-American Commission on Human Rights of the demonstrations of racial hatred and xenophobia and the use of violence at a White Nationalist Rally held in Charlottesville, Virginia, and the need for the state to investigate these incidents promptly); Tanya Kateri Hernandez, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. J. INT'L L. 805 (2010–2011) (stating that although hate speech is also prohibited in Latin America, Latin America is hardly ever included in discussions regarding the regulation of hate speech); *see also* Council of Europe, No Hate Speech Campaign, *Action Day Countering Sexist Hate Speech* (Feb. 17, 2017), http://blog.nohatespeechmovement.org/action-day-to-counter-sexist-hate-speech-8-march-2017-2/ [https://perma.cc/HGF5-J9LH] (marking a call to action for accelerating progress towards the realization of women's rights and gender equality).

165 *See, e.g.*, Vejdeland & Others v. Sweden, App. No. 1813/07, Eur. Ct. H.R., ¶¶ 7–17, 47–60 (Feb. 9, 2012) (exemplifying content which may be considered hate speech in the area of "sexual orientation" and permissible restrictions to the right to freedom of expression under Article 10 of the European Convention).

166 *See* Inter-Am. Comm'n H.R., Press Release No. 250/18, *International Day on the Elimination of Violence against Women,* (Nov. 24, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/250.asp [https://perma.cc/BYS6-XF69] (discussing that new forms of gender-based violence against women have been emerging, which include online violence against women); Council of Europe, *International Women's Day* (Mar. 8, 2017), https://www.coe.int/en/web/portal/8-march-international-women-s-day [http://perma.cc/X788-RKKC] (indicating that there is no lasting solution to gender inequality unless women are fully involved in the process); Estefania Vela Barba, *La Verdadera Ideología de Género* [The True Gender Ideology], N. Y. TIMES (July 11, 2017), https://www.nytimes.com/es/2017/07/11/la-verdadera-ideologia-de-genero/ [https://perma.cc/UAV9-3D9F] (discussing an international movement of concern advocating for the use of gender terminology to promote discrimination and stereotypes which are harmful to women); Inter-Am. Comm'n H.R., Press Release No. 2018-17, *IACHR Regrets Ban on Gender Education in Paraguay* (Dec. 15, 2017), http://www.oas.org/en/iachr/media_center/PReleases/2017/208.asp [https://perma.cc/RQ3J-NL6V] (expressing the Inter-American Commission's

important to recognize the effort of both systems to offer a broad definition of the concept of the family, recognizing equal rights for same-sex couples and their right to form life plans free from stereotypes, discrimination, and forms of exclusion.[167] Both systems are also very well-positioned to begin setting legal standards advancing the prohibition of different forms of violence—such as cyber bullying and revenge porn—which typically happen in the internet space and have discrimination connotations.[168]

Second, both the Inter-American and European systems also have the opportunity to adopt more case decisions which are coherent and establish connections between the discrimination approaches discussed in this article. It is very important to begin exploring the relationship between vulnerabilities and intersections, as well as how these impact state obligations when private actors are involved. Overarching discrimination concepts such as structural, institutional, and multiple forms of discrimination need more nuanced content. It is certainly a gain that the Inter-American system has begun using key terminology such as "structural discrimination" and "multiple forms of discrimination," but these concepts need content for states to be able to enforce them properly.[169] There are ways—illustrated by the work of the United

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concerns over the use of educational materials that refer to "gender theory and/or ideology" in way that promotes discrimination against women and LGBTI persons).

[167] Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶¶ 172–228 (Nov. 24, 2017); Oliari & Others v. Italy, Apps. Nos. 18766/11 and 36030/11, Eur. Ct. H.R. ¶¶ 159–187 (July 21, 2015) H.R., ¶¶ 159–187 (July 21, 2015) (holding that there is a positive obligation upon member states to provide legal recognition for same-sex marriage—not doing so, would be a violation of Article 8 of the European Convention on Human Rights).

[168] For more discussion on cyber bullying and revenge porn, see Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014) (explaining that criminalization of revenge porn is "necessary to protect against devasting privacy invasions that chill self-expression and ruin lives"); Raul R. Calvoz, Bradley W. Davis, and Mark A. Gooden, *Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357 (2013) (discussing the effect of cyber bullying and analyzes the current scope of constitutional protections surrounding student speech rights).

[169] *See, e.g.*, Expelled Dominicans and Haitians v. Dom. Rep. Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 282 ¶¶ 302–318 (Aug. 28, 2014). For more discussion on the use of the concept of "structural discrimination" in the jurisprudence of the Inter-American Court, see

Nations—in which more legal content can be offered to concepts such as "intersectionality" or "multiple forms of discrimination" and what they mean for a state, without overtaking the specialized approach that has been historically demanded by civil society organizations and victims for protected groups.[170]

Third, future case decisions are definitely a vehicle for more content to these terms, but in the case of quasi-judicial bodies such as the Inter-American Commission on Human Rights, the adoption of guidance notes and more practical materials explaining legal standards is also key to promote state compliance.[171]

Fourth, at the present collaboration between the systems is paramount, as the regional human rights protections systems are stronger when they collaborate with each other and refer to each other's standards, as discussed earlier in this article.

Fifth, strategies to obtain a larger number of ratifications of treaties related to persons in a situation of risk and discrimination is also important, since they are lagging at the moment, including those related to key treaties such as Protocol 12 of the European

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Paola Pelletier Quiñones, *La "discriminación estructural" en la evolución jurisprudencial de la Corte Interamericana de Derechos Humanos*, 60 REVISTA IIDH 205 (2014).

170 The author considers that the United Nations treaty-based organs have taken an important lead in achieving this balance between identifying the need for "intersectionality", while preserving the individualized and specialized approach protected groups may need. S*ee, e.g.*, General Recommendation 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19, Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/35 ¶¶ 8–26 (July 26, 2017); General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, 47th Sess., U.N. Doc C/2010/47/GC.2 ¶¶ 8–29 (Oct. 19, 2010); General Recommendation 20 on Non-discrimination in Economic, Social and Cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social, and Cultural Rights, E/C.12/GC/20 ¶¶ 15–35 (July 2, 2009).

171 For more information on recent efforts in this regard, see Inter-Am. Comm'n H.R., *Practical Guide to Reduce Pretrial Detention*, OEA/Ser.L/V/II.163 Doc. 107 (2017), http://www.oas.org/en/iachr/reports/pdfs/GUIDE-PretrialDetention.pdf [https://perma.cc/P8K4-SLSK] (providing recommendations aimed at reducing the use of pretrial detention in accordance with international standards in this subject, with an emphasis on the application of alternative measures that allow the accused person to be released while the criminal procedure goes forward); *Fact Sheets issued by the European Court of Human Rights on pending case-law and pending cases*, http://echr.coe.int/Pages/home.aspx?p=press/factsheets [https://perma.cc/X35R-7RFG] (compiling factsheets by theme on the Court's case-law and pending cases).

Convention, the Istanbul Convention, and the OAS Discrimination Conventions.[172]

In the author's view, there are other important legal questions that the regional protection systems are well-placed to answer in the realm of discrimination. Both systems are well-equipped to identity the criteria which makes a discrimination motive worthy of "suspect level scrutiny". One important issue to explore is whether the main issue is "immutability" or whether a more nuanced analysis is needed.[173] In terms of the due diligence obligation of States, it would be interesting to advance more analysis of how it is applicable to cases which occur in settings driven by economic and social rights, such as discrimination which occurs in the education, health, and employment settings. It is also important to define better what the scope of the due diligence obligation is when businesses and international organizations are the ones committing human rights violations, since this violence and discrimination affects many indigenous peoples, afro-descendent communities, and women.[174]

As indicated earlier, there are a number of doctrines and strategies that have been advanced by the regional protection systems to be closer to domestic tribunals in order to improve the

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[172] *See* Ratifications of Protocol 12 to the Convention on the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 2000), C.E.T.S. No. 177, https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/177/signatures?p_auth=0Kq9rtcm [https://perma.cc/7KSE-YMPZ] (providing for a general prohibition of discrimination and guarantees that no one shall be discriminated against on any ground by any public authority); Istanbul Convention, *supra* note 11, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures [https://perma.cc/H7J7-H9Z2]; OAS Convention on Discrimination and Intolerance, *supra* note 11, http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism_signatories.asp [https://perma.cc/U4RH-TUYD]; OAS Racial Intolerance Convention, *supra* note 69, http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp [https://perma.cc/8S68-4FJ2].

[173] For more detailed analysis, see Celorio, *The Case of Karen Atala and Daughters*, *supra* note 27, at 362–371.

[174] For more reading, see HANNUM, *supra* note 9, 335–461; *see also* Inter-Am. Comm'n H.R., *Indigenous Peoples, Afro-descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II.Doc. 47/15, ¶¶ 1–21 (2015) (addressing State obligations with regard to extraction, exploitation, and development activities concerning natural resources which may be harmful towards indigenous peoples and afro-descendent persons in the Americas).

follow-up of standards and judgments.[175] In this sense, it would be great to see more analysis from the Inter-American Court and its application of the Conventionality Control doctrine to cases involving discrimination against racial and ethnic minorities, as well as women.

Lastly, there are important limitations in the text of treaties which can be better addressed by the regional systems in their interpretations of dispositions to increase legal protections for persons and groups who have suffered historical discrimination. For example, in the case of the European system, the non-independent character of Article 14 of the European Convention continues to be a limitation in the analysis the Court can advance on discrimination issues.[176] There are some recent cases though which exemplify the potential of the Court to overcome this limitation; rulings which contain more expansive analysis of non-discrimination issues such as *Carvalho Pinto de Sousa Morais v. Portugal* discussed earlier. There are also cases that the European Court is tackling with major discrimination implications based on important grounds such as sex, gender, and religion, that the Court has not analysed under the rubric of Article 14, missing an important opportunity. For example, the women applicants in both *Leyla Sahin*

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[175] *See* Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms C.E.T.S. No. 214 (Oct. 2, 2013), http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf [https://perma.cc/V4K2-8K6W]; *T*he Explanatory Report, http://www.echr.coe.int/documents/protocol_16_explanatory_report_eng.pdf [https://perma.cc/9NAZ-9GRJ] (allowing the highest courts and tribunals of a High Contracting Party to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto); Eduardo Ferrer McGregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights,* 109 AM. J. INT'L L. UNBOUND 93 (2015) (analyzing the development of the "conventionality control" doctrine by the Inter-American Court of Human Rights to promote the application and compliance with the American Convention on Human Rights and the Court's jurisprudence); HANNUM, *supra* note 9, 552–66.

[176] *See* Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99–124 (2013) (regarding the ambivalence of the European Court of Human Rights case law on the applicability of the prohibition of discrimination of Article 14 of the European Convention on Human Rights); Rory O'Connell, *Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR*, 29 LEGAL STUDIES: J. SOC'Y LEGAL SCHOLARS 211 (2009) (discussing how Article 14 has been dismissed as a "Cinderella provision" but after development and time "may live up to its potential as a powerful non-discrimination principle").

v. Turkey[177] and *SAS v. France*[178] – related to the regulation of headscarves and veils – presented discrimination allegations based on gender and religious grounds, and these were not addressed by the European Court under Article 14, which the author hopes it does in the future.

In the case of the Inter-American system, there has been ample scholarship developed on the limitations of Article 26 of the American Convention to address economic, social, and cultural matters, which are intrinsically related to discrimination issues, and the importance of ruling more cases which add content to this Article since the San Salvador Protocol has only been ratified by sixteen states.[179] The Inter-American Court just expanded the scope of its analysis of Article 26 of the American Convention in the case of *Lagos del Campo v. Peru*.[180] The author has already shared in her scholarship her concerns over the segmented interpretation of the Inter-American Court of the relationship between Articles 1.1 and 24 of the American Convention, which the author considers should be undertaken in a more organic and integral sense, according to international law principles.[181] Both systems should also continue using their mandates to offer expansive definitions to treaty dispositions in the area of discrimination; a task that has many opportunities as exemplified in the cases already discussed from

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177 Leyla Sahin v. Turkey [GC], App. No. 44774/98, Eur. Ct. H.R. ¶¶ 3, 163–66 (Nov. 10, 2005).

178 S.A.S. v. Fr. [GC], App. No. 43835/11, Eur. Ct. H.R. ¶¶ 3, 160–62 (July 1, 2014).

179 *See, e.g.*, Tara Melish, *Rethinking "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 1 (2006) (calling for a rethinking of the proposed "less as more" thesis, reframing it from a technical-jurisdictional perspective that focuses not on decontextualized notions of "justiciable rights" but rather on the scope and nature of the claims made under those rights); Oscar Parra Vera, Revista IIDH, *Notas sobre acceso a la justicia y derechos sociales en el Sistema Interamericano de Derechos Humanos* Volume 50 (2009), www.corteidh.or.cr/tablas/r25531.pdf [https://perma.cc/7SGT-VGR9] (regarding access to justice and social rights in the Inter-American System of Human Rights); *see also* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Nov. 17, 1988) Status of Ratifications and Signatures, http://www.oas.org/juridico/english/sigs/a-52.html [https://perma.cc/9ZCZ-UHMM].

180 *See* Lagos del Campo v. Peru, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 340, ¶¶ 73–166 (Aug. 31, 2017) (recognizing the direct enforceability of economic, social and cultural rights (ESCR) under Article 26 of the American Convention on Human Rights).

181 *See* Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 25, at 861, n. 229.

both systems which offer a broad reading to the general discrimination prohibition in Article 1.1. of the American Convention and Article 14 of the European Convention.

I do hope to continue seeing increased uniformity of legal interpretations and legal principles in the area of discrimination from both regional systems. Some of the most important statements from both systems have been issued referring to the other.[182] It is also key that regional protection systems and the universal system work in tandem to obtain a certain degree of uniformity in their legal standards concerning discrimination.

4. CONCLUDING THOUGHTS

The continued existence of human rights protection systems in Europe and the Americas is fundamental for international dialogue and cooperation, as well as for the possibilities they offer to review issues at a supranational level, and as a second avenue for victims of human rights violations. In the author's view, finding ways to make them more effective is vital for their survival.

The continued financial and political support of human rights systems is also key for them to succeed; support that depends greatly on their short-, medium-, and long-term effectiveness. In the author's view, the systems should prioritize not only finding creative ways to become more effective, but strategies to preserve their present impact or *acquis*, given the present challenges.

Discrimination today in Europe and the Americas is an ongoing problem, with many layers and dimensions to address. Discrimination is direct and indirect, systemic and structural. It affects persons of every sex, gender, age, racial and ethnic background, and social class. It can be in the form of disparate or disadvantageous treatment without justification. It is illustrated in

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[182] *See* Atala Riffo & Children v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 124 (Feb. 24, 2012) (referring to cases from the European Court of Human Rights); Karner v. Austria, App. No. 40016/98 Eur. Ct. H.R. ¶ 37 (2003) (which reiterates that, for the purposes of Article 14 of the European Convention on Human Rights, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is no a reasonable relationship of proportionality between the means employed and the aim sought to be realized); Kozak v. Pol., App. No. 13102/02, Eur. Ct. H. R. ¶ 92 (2010) (referencing Article 14 of the European Convention on Human Rights and noting that sexual orientation is a covered concept of the Article).

hate speech; cyber violence; sexual harassment; the "*Me too*" and "*Time's Up*" movements; and domestic and sexual violence. It happens in homes, schools, employment places, prisons, religious settings, and health institutions. The way regional protection systems address discrimination and its many forms in the present and the future is a key determinant of their continued relevance.

Despite the complexity of the current context and the intricate dynamics of discrimination and social exclusion, the author remains hopeful that the regional human rights protection systems do have windows of opportunity and are producing an important body of work which could have a measure of impact at the national level. A well-articulated strategy, including the participation of persons and groups who are the main bearers of social discrimination and continued exclusion, continues to be key to improve the effectiveness of the work and state compliance.

In the current global scheme, the author considers vital that the regional protection systems continue employing all means at their disposal to promote and serve as symbols of substantive equality, inclusion, leadership, and the full exercise of human rights for all. This is a key ingredient to resolve the enigma of effectiveness.